Form 843
U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
(Revised July 1953)

CLAIM

TO BE FILED WITH THE DISTRICT DIRECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The District Director will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form.

- ☐ REFUND OF TAXES ILLEGALLY, ERRONEOUSLY, OR EXCESSIVELY COLLECTED.
- ☐ REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.
- ☐ ABATEMENT OF TAX ASSESSED (not applicable to estate, gift, or income taxes).

DISTRICT DIRECTOR'S STAMP
(Date received)

TYPE OR PRINT

Name of taxpayer or purchaser of stamps: Massey Motors, Inc.

Street address: 830 Main Street

City, postal zone number, and State: Jacksonville, Florida

1. District in which return (if any) was filed: Florida
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from: Jan. 1, 1951 to Dec. 31, 1951
3. Kind of tax: corporate income tax
4. Amount of assessment, $ 5,684.86; dates of payment: 10-22-54 and 10-27-54
5. Date stamps were purchased from the Government: $ 5,684.86
6. Amount to be refunded: $ - - - -
7. Amount to be abated (not applicable to income, estate, or gift taxes):

The claimant believes that this claim should be allowed for the following reasons:

See attached Statement of Reasons For Allowance of Claim.

(Attach letter-size sheets if space is not sufficient)

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

MASSEY MOTORS, INC.
Signed: s/ W. W. Massey, Sr.
Its President

Dated: November 29, 1954

(SEE INSTRUCTIONS ON OTHER SIDE)

EXHIBIT "B"

LIBRARY
SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 141

MASSEY MOTORS, INC., PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 24, 1959
CERTIORARI GRANTED OCTOBER 12, 1959

INDEX

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF FLORIDA,
JACKSONVILLE DIVISION

MASSEY MOTORS, INC.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant

Civil Action No. 3346-Civil-J

FILED JACKSONVILLE, FLA., JANUARY 17, 1956
JULIAN A. BLAKE, Clerk

COMPLAINT

Comes now the Plaintiff, Massey Motors, Inc., by its undersigned attorneys and complains of the United States of America and alleges as follows:

FIRST CAUSE OF ACTION

1.

Jurisdiction of this action is conferred by Section 1346(a)(1) of Title 28, United States Code as amended.

2.

Plaintiff is a corporation organized and existing under and

by virtue of the laws of the State of Florida with principal office at 830 Main Street, Jacksonville, Duval County, Florida.

3.

This action is one to recover a corporate income tax and interest thereon erroneously or illegally assessed and collected without authority under the Internal Revenue Laws of the United States, pursuant to the authority conferred to sue under Section 1346(a)(1) of Title 20, United States Code, as amended.

4.

That on or about March 15, 1951, Plaintiff filed with and in the office of the then Collector of Internal Revenue for the District of Florida at Jacksonville, Florida, its corporate income tax return Form 1120 for the calendar year 1950 and duly paid to the said Collector, the corporate income tax shown on said return to be due and owing by the Plaintiff to the United States Government; that on or about October 20, 1954, the Commissioner of Internal Revenue assessed additional corporate income tax and interest against the Plaintiff as follows: Income tax in the amount of $3,012.99 and interest thereon in the amount of $650.27; that this additional income tax and accrued interest thereon were paid by the Plaintiff to the United States Government on the dates of October 20 and 27, 1954, in the aggregate amount of $3,663.26. The said additional tax and interest thereon were erroneously or illegally assessed, imposed upon and collected from the Plaintiff, the reason for and basis of such allegation being set forth in detail in Claim Form 843, filed with the Commissioner of Internal Revenue, a true copy of which is hereto attached, marked Exhibit "A" and hereby made a part of this complaint.

5.

That on February 3, 1955, Plaintiff filed a claim for refund in the amount of $3,663.26, plus interest, of the tax and interest paid for the calendar year 1950. A true copy of said claim is hereto attached, marked Exhibit "A", and heretofore by reference made a part of this Complaint.

6.

That said claim for refund was rejected by action of the Commissioner of Internal Revenue by letter dated July 18, 1955.

SECOND CAUSE OF ACTION

1.

The allegations contained in paragraphs 1, 2 and 3 of the First Cause of Action are hereby incorporated by reference.

2.

That on or about March 15, 1952, Plaintiff filed with and in the office of the then Collector of Internal Revenue for the District of Florida at Jacksonville, Florida its corporate income tax return Form 1120 for the calendar year 1951 and duly paid to the said Collector the corporate income tax shown on said return to be due and owing by the Plaintiff to the United States Government; and that on or about October 20, 1954, the Commissioner of Internal Revenue assessed additional income tax and interest thereon against the Plaintiff as follows: Income tax in the amount of $4,918.46 and accrued interest in the amount of $766.40; that this additional tax and accrued interest thereon were paid by the Plaintiff on

October 20 and 27, 1954 in the aggregate amount of $5,684.86. The said additional tax and interest thereon were erroneously or illegally assessed, imposed upon and collected from the Plaintiff, the reason for and basis of such allegation being set forth in detail in Claim Form 843, filed with the Commissioner of Internal Revenue, a true copy of which is hereto attached, marked Exhibit "B", and hereby made a part of this Complaint.

3.

That on February 3, 1955, Plaintifff filed a claim for refund in the amount of $5,684.86, plus interest, of the tax and interest paid for the calendar year 1951, a true copy of said claim and the statement attached thereto is hereto attached, marked Exhibit "B", and heretofore by reference made a part of this Complaint.

4.

That said claim for refund was rejected by action of the Commissioner of Internal Revenue by letter dated July 18, 1955.

WHEREFORE, Plaintiff prays that a judgment may be entered in favor of the Plaintiff against the Defendant as follows:

1. In the First Cause of Action in the amount of $3,663.26, plus interest thereon and costs of this suit and for such other relief as to the Court may seem proper and;

2. In the Second Cause of Action in the amount of $5,684.86, plus interest allowed by law, together with costs and

such other relief as to the Court may seem proper.

JOHN A. RUSH

Florida Theatre Building
Jacksonville, Florida

HILL AND FRAZIER

WILLIAM R. FRAZIER

816 Atlantic Bank Building
Jacksonville, Florida

ATTORNEYS FOR PLAINTIFF

Form 843
U.S. TREASURY DEPARTMENT
Internal Revenue Service
(Revised July 1952)

CLAIM

TO BE FILED WITH THE DISTRICT DIRECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The District Director will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form.

- ☐ REFUND OF TAXES ILLEGALLY, ERRONEOUSLY, OR EXCESSIVELY COLLECTED.
- ☐ REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.
- ☐ ABATEMENT OF TAX ASSESSED (not applicable to estate, gift, or income taxes).

DISTRICT DIRECTOR'S STAMP
(Date received)

TYPE OR PRINT

Name of taxpayer or purchaser of stamps: **Massey Motors, Inc.**

Street address: **830 Main Street**

City, postal zone number, and State: **Jacksonville 2, Florida**

1. District in which return (if any) was filed: **Florida**
2. Period (if for tax reported on a return basis, prepare separate form for each taxable year) from: **Jan. 1, 1950** to **Dec. 31, 1950**
3. Kind of tax: **corporation income tax**
4. Amount of assessment: $ **3,663.26** dates of payment: **10-22-54 and 10-27-54**
5. Date stamps were purchased from the Government:
6. Amount to be refunded: $ **3,663.26**
7. Amount to be abated (not applicable to income, estate, or gift taxes): $

The claimant believes that the action should be allowed for the following reasons:

An agent of the Internal Revenue Service in auditing the above-named taxpayer's 1950 corporate income and excess profits tax return, filed a report covering his examination dated April 10, 1953, pursuant to which the Commissioner assessed a deficiency against the taxpayer for 1950 of $3,012.99 with interest thereon of $650.27. The Commissioner determined that the taxpayer was not entitled to depreciation on (1) automobiles leased by taxpayer to its subsidiary, Atlantic Discount Company, Inc., (2) automobiles used by various Company personnel, and (3) a demonstrator in the amount of $9,346.69 as claimed on the taxpayer's 1950 return; and the Commissioner further determined that the taxpayer was not entitled to long term capital gains treatment on gains realized from the sale of said automobiles in the amount of $16,960.21. As a basis of the within claim, the taxpayer contends that it is entitled to a reasonable allowance for depreciation as claimed on the aforementioned automobiles, constituting property used in its trade or business, under Section 23(l) of the Internal Revenue Code of 1939; and that the gain realized by it on the sale of said automobiles is reportable as long term capital gain pursuant to the provisions of Section 117(a) and 117(j) of the Internal Revenue Code of 1939.

WHEREFORE, the taxpayer respectfully demands refund of said deficiency and interest, plus interest thereon as allowed by law.

(Attach letter-size sheets if space is not sufficient)

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

MASSEY MOTORS, INC.

Signed s/ W. W. Massey, Sr.
Its President

Dated **November 29**, 1954

(SEE INSTRUCTIONS ON OTHER SIDE)

EXHIBIT "A"

STATEMENT OF REASONS FOR ALLOWANCE OF CLAIM

An agent of the Internal Revenue Service in auditing the above-named taxpayer's 1951 corporate income and excess profits tax return, filed a report covering his examination dated April 10, 1953, pursuant to which the Commissioner assessed a deficiency against the taxpayer for 1951 of $4,918.46, with interest thereon of $766.40. The Commissioner determined that the taxpayer was not entitled to depreciation on (1) automobiles leased by taxpayer to its subsidiary, Atlantic Discount Company, Inc., (2) and on automobiles used by various Company personnel in the amount of $11,572.45 as claimed on the taxpayer's 1951 return; the Commissioner also determinded that the amount of $2,177.54 excluded from income by the taxpayer during 1951 as a reserve for repossessions is includible as income for the period ended December 31, 1951; and the Commissioner further determined that the taxpayer was not entitled to long term capital gains treatment on gains realized from the sale of said automobiles in the amount of $13,686.38. As a basis of the within claim, the taxpayer contends that it is entitled to a reasonable allowance for depreciation as claimed on the aforementioned automobiles, constituting property used in its trade or business, under Section 23(1) of the Internal Revenue Code of 1939; that the reserve for repossession set up by it for 1951 of $2,177.54 was reasonable in amount and legally excludable from taxable income for the period ended December 31, 1951; and that the gains realized by it on the sale of said automobiles is reportable as long-term capital gain pursuant to the provisions of Section 117(a) and 117(j) of the Internal Revenue Code of 1939.

WHEREFORE, the taxpayer respectfully demands refund

of said deficiency and interest, plus interest thereon as allowed by law.

No. 3346-Civil-J

FILED JACKSONVILLE, FLA., MARCH 16, 1956

JULIAN A. BLAKE, Clerk

STIPULATION EXTENDING TIME FOR DEFENDANT TO PLEAD

IT IS STIPULATED AND AGREED by and between the undersigned attorneys for the respective parties to this cause that the defendant, United States of America, shall have an extension of fifteen days from March 16, 1956, within which to plead to the complaint herein.

Dated at Jacksonville, Florida, March 16th, 1956.

HILL AND FRAZIER
By WILLIAM R. FRAZIER
Attorneys for Plaintiff
801 Atlantic National Bank Bldg.
Jacksonville, Florida

JAMES L. GUILMARTIN
United States Attorney
By EDITH HOUSE
Assistant United States Attorney
Attorneys for Defendant
407 Post Office Building
(P. O. Box 59)
Jacksonville 1, Florida

CIVIL ACTION NO. 3346

FILED JACKSONVILLE, FLA., MARCH 19, 1956

JULIAN A. BLAKE, Clerk

ANSWER

Comes now the United States by its attorney, James L. Guilmartin, United States Attorney for the Southern District of Florida and answers the allegations of the complaint, as follows:

FIRST CAUSE OF ACTION

1. The allegations of paragraph numbered 1 are admitted.

2. The allegations of paragraph numbered 2 are admitted.

3. The allegations of paragraph numbered 3 are admitted, except it is denied that the corporate income tax and interest thereon was without authority, erroneously or illegally assessed and collected.

4. The allegations of paragraph numbered 4 are admitted, except it is not intended to admit any of the allegations contained in plaintiff's Exhibit "A" not expressly admitted elsewhere in this answer; but it is denied that the corporate tax and interest thereon was erroneously or illegally assessed, imposed upon or collected from the plaintiff and that plaintiff filed its corporate income tax Form 1120 for the calendar year 1950 on or about March 15, 1951. Defendant alleges that on March 12, 1951 plaintiff filed a tentative income tax Form 1120 with the Collector of Internal Revenue for the District of Florida requesting an extension of time to May 15, 1951, which was granted, and plaintiff thereafter filed its income

tax Form 1120 on May 12, 1951.

5. The allegations of paragraph numbered 5 are admitted, except it is not intended to admit any of the allegations contained in plaintiff's Exhibit "A" not expressly admitted elsewhere in this answer.

6. The allegations of paragraph numbered 6 are admitted.

SECOND CAUSE OF ACTION

1. The allegations of paragraph numbered 1 are admitted, except it is denied that the corporate income tax and interest thereon was without authority, erroneously or illegally assessed and collected.

2. The allegations of paragraph numbered 2 are admitted, except it is not intended to admit any of the allegations contained in plaintiff's Exhibit "B" not expressly admitted elsewhere in this answer; but it is denied that the corporate tax and interest thereon was erroneously and illegally assessed, imposed upon or collected from plaintiff.

3. The allegations of paragraph numbered 3 are admitted, except it is not intended to admit any of the allegations contained in Plaintiff's Exhibit "B" not expressly admitted elsewhere in this answer.

4. The allegations of paragraph numbered 4 are admitted.

WHEREFORE, the defendant respectfully demands that judgment be entered in its favor with respect to the first and

second cause of action, with allowable costs.

JAMES L. GUILMARTIN

United States Attorney

By: EDITH HOUSE

Asst. United States Attorney

I CERTIFY that on this date a copy of the foregoing Answer of the United States was furnished by mail to Hill and Frazier, Attorneys for Plaintiff, at their last known mailing address, namely, 801 Atlantic National Bank Bldg., Jacksonville, Florida.

Dated at Jacksonville, Florida, March 19, 1956.

EDITH HOUSE

Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT
OF FLORIDA.
JACKSONVILLE DIVISION.

MASSEY MOTORS, INC.,

Plaintiff,

-vs- No. 3346-Civil-J

UNITED STATES OF AMERICA,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Before the Honorable Bryan Simpson, Judge of the above Court, without a Jury, in the trial of said cause, held February 20 and 21, 1957.

APPEARANCES:

Hill and Frazier, Esqs.,
By: William R. Frazier, Esq.,
John A. Rush, Esquire,
of Counsel,
Attorneys for the Plaintiff.

Jerome S. Hertz, Esquire,
Department of Justice, Tax Division,
Attorney for the Defendant.

INDEX TO WITNESSES

For the Plaintiff:	*Direct*	*Cross*	*Redirect*	*Recross*
Parks, Henry Edward	5-32	32-66	66-69 71-72	69
Lumpkins, Howard Lewis	74-84			

INDEX OF EXHIBITS

For the Plaintiff:	*In Evidence*
1	3
2	3
3	4
4	4
5	5
6	24
7	78

MR. MADSEN: Your Honor, I would like to introduce Mr. Jerome S. Hertz. He is from the Department of Justice, Tax Division, and a member of the Bar of the District of Columbia. He will try the case --

THE COURT: He will try the case for the United States. We are glad to have you with us.

MR. HERTZ: Thank you.

THE COURT: You may proceed, Mr. Frazier.

(OPENING STATEMENT BY MR. FRAZIER)

MR. FRAZIER: Before we actually start the case, Your Honor, there are several exhibits we would like to introduce at this time.

The first exhibit is Plaintiff's Exhibit Number 1 and is the Corporation Income Tax Return of Massey Motors, Inc. for the year 1950; and a similar exhibit for the taxtable year 1951.

THE COURT: Received as Exhibits 1 and 2.

... The foregoing documents were received in evidence and marked Plaintiff's Exhibits #1 and #2.

MR. FRAZIER: And Government counsel will, of course request permission to withdraw the originals and substitute photostats.

THE COURT: He can do that at any time after the trial is over by substituting photostats and giving the

Clerk a receipt.

MR. FRAZIER: Next, Your Honor, Plaintiff offers, as Plaintiff's Exhibit Number 3, a Schedule with respect to the taxable year 1950, which shows practically all the financial data with respect to the Company cars; and a similar Schedule for the taxable year 1951 as Plaintiff's Exhibit 4.

THE COURT: You are familiar with these are you?

MR. HERTZ: Yes, Your Honor. Those are from the Internal Revenue files. I would like to request permission to have some photostats made, because they are reduced in size almost to illegibility.

THE COURT: You are going to try to make some larger ones?

MR. HERTZ: Yes, Your Honor, at least this size.

THE COURT: Certainly, immediately after trial or as soon as I can get through with it, you can have them back.

MR. HERTZ: I would like to be permitted to use them in connection with the cross examination of the witnesses.

THE COURT: Sure. They are in evidence. I understand that.

... The foregoing documents were received in evidence and marked Plaintiff's Exhibit #3 and #4.

MR. FRAZIER: And lastly, Your Honor, Plaintiff offers a photostatic copy of the original thirty-day letter involved in this proceeding for the tax years 1950 and '51, as Plaintiff's Exhibit number 5.

THE COURT: That's received without objection.

... The foregoing document was received in evidence and marked Plaintiff's Exhibit #5.

(OPENING STATEMENT BY MR. HERTZ)

HENRY EDWARD PARKS,

having been produced and first duly sworn as a witness on behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION

BY MR. FRAZIER:

Q What is your profession or occupation?

A General Manager of Massey Motors, Incorporated.

THE COURT: What is his name for the record?

Q Give us your full name, please, sir?

A Henry Edward Parks.

Q And you reside here in Jacksonville?

A Right.

Q How long have you been employed as General Manager of Massey Motors, Inc.?

A 1949.

Q And did you hold that position during the two years involved in this suit?

A I did.

Q Are you an officer of the corporation?

A Yes, sir, I am.

Q What office do you hold?

A Secretary.

Q Are you a director?

A No, I am not.

Q Are you a stockholder?

A No.

Q Now, this Massey Motors, Incorporated, is that a Florida corporation?

A Yes, it is.

Q And what is its business?

A A franchised automobile dealership.

Q A franchise by whom?

A Chrysler Corporation.

Q And what type of Chrysler dealer is it? What kind of car --

A Handling-- during the period of this case, 1950 and 1951-- Dodge and Plymouth passenger cars, Dodge gyrated trucks and used vehicles.

Q And what is the approximate trade area served by this corporation Massey Motors, Inc.?

A Uh-- Duval County, Clay County, Baker County, Nassau County; and in the State of Georgia, Camden County and Charlton County.

Q Now, did Massey Motors, Inc. during the years involved in this suit have any other relationship with the Chrysler Corporation, other than being its retail Dodge and Plymouth dealer here?

A Yes. We were known as a direct dealer, or distributorship.

Q Explain what sort of arrangement that was?

A In such an arrangement a direct dealer will assign associate dealers in the counties in which his sales area is located, and in turn-- the direct dealer will buy his merchandise from the factory and will in turn sell to the associate dealers.

Q And how many associate dealers did you have, if you remember, during 1950-'51?

A During the period covered, three.

Q Where were they located?

A Located in Green Cove Springs, Florida; Kingsland, Georgia; Macclenny, Florida.

Q Could you state a little more in detail what the relationship was between Massey Motors and the associate dealers?

A Yes, I can. The associate dealers in buying all of their merchandise from us had no direct relationship with Chrysler Corporation. Chrysler Corporation did not have the authority to even call on an associate dealer without a member of the direct dealership being in company with him, and we helped them with their organization in sales work, not only with automobiles but in parts as well.

Q Well, would it be a correct description then to say that you in effect were substituting as the manufacturer, as far as those associate dealers were concerned, in helping them?

A Yes.

Q Supervising their operations?

A That's right.

Q How many employees did Massey Motors have during these two years, do you know?

A It varied from about 85 to about 120 during the period covered.

Q And how about the place of business of Massey Motors; where was it located during this period we have involved here?

A Actually several locations. Our main place of business and offices were maintained at 830 Main Street; our service building housing our parts department, service facilities and body shop was at 35 West State Street; a used car location at 36 West State Street; a used car location at 1248 Main Street; warehouse facilities located at 8941 Main Street Road; a used car lot located at 2131 West Beaver Street. That was a parent corporation, I might add.

Q How about the subsidiary?

A Subsidiary corporation, Atlantic Motor Sales. They were located on the South Side of the River at 1524 San Marco Boulevard. They also maintained a used car lot in the twenty-hundred block of Beaver Street-- West Beaver Street-- and a used car lot on Miami Road, on the South Side of the River.

Q What was the business of the subsidiary?

A The subsidiary corporation was also a direct dealership with Chrysler Corporation.

Q It was a new car sales concern?

A Handling the same products.

Q Now, Mr. Parks, in the operation of the new car sales operation, and for that matter the used car sales operation, what is the practice, or was the practice, of Massey Motors during these years with respect to driving the automobiles around town if it would help sales to its customers? Would you drive the new cars, or --

A No, that isn't a practice there at all.

Q Well, explain that, please.

A We in no case drove new vehicles that were placed up on the market for sale to retail customers on the street. We did have cars which we termed company-owned vehicles. Do you want me to go into detail with you on that?

Q No. I was just wondering about that. How about used cars? Did you drive them around? The ones that would help the sales of new cars?

A No, we did not.

Q Now, with respect to those-- whatever you might refer as inventory, new or used cars, if you will. Was it a practice during those years to title those cars in the name of the sales corporation?

A New cars that were taken out of our new car inventory and placed in company service --

Q No. I am referring now to the cars that you had for sale to the public?

A No; they were not titled.

Q How about the used cars held for sale?

A Used cars held for sale to the public, as a general-- well, were always titled when they came to us.

Q In the previous owner's name?

A That's correct.

THE COURT: In blank. He'd just sign that thing in blank there and you'd hold it until you sold it?

THE WITNESS: That's correct.

THE COURT: And then let the new owner-- put the new owner's name on it and send it to Tallahassee for re-title?

THE WITNESS: That's correct; yes, sir.

BY MR. FRAZIER:

Q Now, Mr. Parks, are you familiar with the accounting system employed by Massey Motors, Inc: during those two years?

A Yes, sir, I am.

Q Will you please explain, in a general way, how the accounting records of the plaintiff corporation reflect the purchase of new cars? How do you make the entries when you buy cars from Chrysler?

A When we purchase cars from Chrysler Corporation, in our particular case we have made arrangements by agreement with our-- with the finance company that we were doing business with-- whereby Chrysler Corporation would draft on the finance company for the purchase price of the automobiles at the time they left the factory. We, in turn, were invoiced by the corporation and paid the finance company immediately on receipt of that invoice for those automobiles. Those automobiles, when they were paid for by us as the dealer, were placed in our New Vehicle Inventory Account for sale to the general public. That account number, I believe, was Account Number 131.

Q Is that in your journal or in your ledger?

A Yes, it's in my general ledger.

Q I see. And you mentioned previously that a certain number of these cars were withdrawn for company cars. Would you explain what the company cars were, now?

A The company cars, when they were removed from the New Vehicle Inventory, were entered through our sales journal as a direct sale to the corporation. They were removed from the inventory Account Number 131, which was new vehicles for sale to the general public, and placed in our new car-- or, rather, company car account, which was Account Number 167.

Q What is the classification, accountingwise, of that account?

A What do you mean?

Q Is it a fixed asset account?

A Yes.

Q And then what happened?

A Those cars were immediately set up over a period of thirty-six months for depreciation purposes, and at the end of each month they were depricated. And they were taken in on a cost basis.

Q And what was the accounting procedure if one of those cars was sold and removed from company service?

A Well, when a car was removed from company service and sold, of course it was immediately removed from the New Vehicle Inventory and your proper accounting procedure followed; and in the case of a capital gain or a capital loss, it was so designated on the books.

Q Well, did any of the company cars-- was there an accounting procedure which ever removed the company cars from the fixed asset account back to the new car inventory?

A No, never. That would be impossible because a new car inventory account carries only cars that have never been titled. And these cars we are talking of were titled in the name of Massey Motors.

Q I see. Now, what was the accounting procedure with respect to the leased vehicles?

A Leased vehicles were handled in identically the same manner, titles and all.

Q I wonder at that point if you would explain what this leasing arrangement was, if you know, during these two years?

A The leasing arrangement was with Atlantic Discount Company, Incorporated and it was a verbal agreement whereby we would furnish them automobiles for use by their adjusters, office managers, and so forth, at the rate of three cents per mile return, which was payable monthly. And those cars were called back in at the end of a twelve-month period, or at 40,000 miles, which ever occurred first.

Q Then they were disposed of by Massey Motors?

A That is correct.

Q Now, in the operation of Massey Motors, Inc., who made the decision to place a car in company use or in lease use? How is that handled?

A That was always made by top management.

Q And as I understand your previous testimony, when those cars were put in that service they were titled; is that correct?

A That is correct.

Q Now, by titling, what do you mean?

A Registered with the State of Florida.

Q Showing Massey Motors as the owner?

A Showing Massey Motors as the owner; yes.

Q Now, with respect to that situation, were these automobiles insured against public liability and property damage in any way?

A Cars placed in company service, yes, were insured by a blanket policy which we carried. However, by an agreement we had with the finance company, they provided coverage on the cars they were using.

Q Is that the Atlantic Discount Company?

A That is correct.

Q That was on the leased vehicles?

A That was on the leased vehicles.

Q I see. And what type of Florida license plates were placed on these company cars and leased vehicles?

A A regular license tag, not a "for hire" tag.

Q Now, do you all ever use a so-called "dealer" tag?

A Yes, we do.

Q What are dealer tags?

A Dealer tags are tags that are made available to automobile dealers by the State of Florida. Our State law says that no vehicle shall be operated on the highways without a current year license tag on it, and on occasion we would sell automobiles, we'll say, on Saturday afternoon. The license bureau would be closed. It was necessary to place a dealer tag on that car so that the new owner could operate it until a tag could be purchased in his name.

THE COURT: That's the only thing you used a shop tag for in your operations?

THE WITNESS: Yes, sir. They were not used on any company --

THE COURT: Not used on the new cars, the demonstrators, or anything of that sort?

THE WITNESS: No, sir.

BY MR. FRAZIER:

Q Now, in that connection, Mr. Parks, we inject the word

"demonstrator." Now, did Massey Motors have any demonstrators, as you understand that term?

A Actually, no. Now, there is one unit listed on the schedule which I furnished Internal Revenue whereby I listed a demonstrator.

Q Let's get that. It might be well enough at this point to go into that subject. I hand you Plaintiff's Exhibit Number 3, which is the Schedule of company car accounting data for the year 1950. (Handing document to witness)

A (Witness examining document)

Q Will you explain what the situation was with respect to that truck, or whatever it is that you were going into?

A Yes. The first item listed on this covers a 1949 Dodge Route Van. I might say here that route van was a new type of truck being introduced on to the market, in that it had a motor and drive shaft mounted to the far left side of the frame. It did not go down to the center. The cab came out practically to the bumper in front on the right. It was a low, underslung unit which was designed for department stores and for low-loading business houses. It was something that was so completely new that we found it necessary to put one of these units in service and place it with various business houses so that they could see that it would operate, because nothing like it had ever been introduced on the market before.

Q I see. Did you have any other similar type vehicles in these two years?

A No, we did not. This was the only one.

Q I see. Now, Mr. Parks, I am also going to give you Plaintiff's Exhibit Number 4, which is a similar schedule for the calendar year 1951, and I ask you to hold them there so that you can refer to them if you like-- (Handing document to witness)

A Surely.

Q -- and I will ask, Mr. Parks, if you could enumerate for us from your recollection of the situation as the General Manager of this corporation, just what the company cars were used for? Just as specifically as you can during the two years we have in suit?

A Yes. The various officials of the parent corporation, plus the managers of their subsidiary corporation, in the general course of everyday business in traveling to and from the various locations, these cars were necessary. They were also necessary in making bank deposits, messenger service, well, coming to the post office, for loaning to customers-- quite frequently you have a doctor or someone like that that cannot be without an automobile; you will let him have one of the company official's cars to tide him over. In some cases- at one time in 1951, or '50 rather, we had a strike with Chrysler Corporation that lasted a hundred days. During that time we had several good customers who had total losses with their automobiles and it was necessary for us to put a car out. We also use the cars in contacting our associate dealerships and helping them run their business; for use in various civic functions, such as parades, and so forth. And, I believe in the years involved, we had factory meetings in Atlanta, Georgia, at Tampa, Florida, and at one time we had a special school over at the University of Florida which was sponsored by Chrysler Corporation. We had to have men there for a six-week period, daily.

Q What connection would a company car have with that?

A Furnishing transportation to and from.

Q That included going to Atlanta?

A Yes.

Q And Tampa?

A Yes. Those were new car showings, factory-called meetings.

Q And as I understand, that-- that is in general-- applies to all of the cars designated company cars; is that correct?

A Yes, it would.

Q Well now, Mr. Parks, I notice-- I have a photostat of that exhibit and I notice that, of course, there are sales of these so-called company cars and for the leased vehicles during both of these years; in fact, there are quite a few of them. I wonder if you would tell us what happened to prompt the management to sell these cars, take them out of company use or lease use? What was the situation?

A Well, during the years involved, the economic conditions were such that factory production was not as high, nothing compared with what it is today. On some occasions due to a very good customer being without transportation in a case of total loss, we did agree to pull a company-owned automobile out and sell one. In other cases, we --

Q Well, let's say except for those exceptional cases, what was the general practice about keeping these cars in service?

A The general practice was to pull them out either immediately before or as soon after a model change as possible.

Q Why was that done?

A Well, we felt it was good for business to have our automobiles, company-owned equipment, of the current-year model because that's what we were representing to the public.

Q Was this another factor which would have caused the sale of these vehicles as a general matter?

A Yes, it would because, when the new model comes out, the past-year model immediately drops in value if you hold it.

Q In other words, you sold it to get a better recovery on it?

A That is correct.

Q Were there any other factors that entered into the decision besides the matter of model, year, and price decline that would cause the sale of these vehicles? I notice, for example, that on your schedules that some of them were sold during the current model year. Why was that, if there is any reason?

A Yes, for several of the reasons that I gave you there, such as the event of a total loss.

Q Well, you testified with respect to leased vehicles that the company took them back after 40,000 miles. Was there any similar policy with respect to Massey Motors as affecting these company cars?

A Yes, there was.

Q What was that?

A That was on Massey Motors vehicles; 10,000 miles, roughly.

Q Well, let's see if I understand. Suppose, sir, you had a vehicle in service for, say, eight months and if there was no model change but it had 10,000 miles on it-- do I understand that that would be sold at that point? Is that --

A Yes, it would.

Q And why was that practice followed?

A Again, to hold a new automobile longer than that period, you go into a declining price.

Q It was a matter of business judgment?

A That's correct, business judgment.

Q Do you know whether that is generally done in the automobile industry, to your knowledge?

A I think that it is.

Q Now, I also notice from the schedules, Plaintiff's Exhibits Numbers 3 and 4, that during these two years there were profits made on the sale of these units after they had been in service, as you testified, with respect to company cars and to some extent the leased vehicles?

A That's correct.

Q All right. Can you explain to us how that was possible since they were, I take it, used cars?

A Well, I think that the economic conditions would be your explanation on that.

Q Explain it a little more specifically

A Well, we can take periods back before the war when that was not the case and we are fast, well, we have reached it again in some instances now.

Q What happens?

A Well, we do not regain the entire cost of the vehicle that was placed in service.

Q But you did in the aggregate with respect to these vehicles?

A Yes, we did.

Q Why was that; do you know?

A Well, I would say it was due to economic conditions.

Q What economic conditions?

THE COURT: The Korean War and then cars were in short supply.

THE WITNESS: That's right.

BY MR. FRAZIER:

Q And the demand was more than the supply?

A That's right.

THE COURT: You could run one for six months or a year and still get more than a new car cost out of it.

THE WITNESS: That's true.

BY MR. FRAZIER:

Q Now, with respect to --

THE COURT: Excuse me. As long as I brought it up, how many cars were involved in each year? How many company cars were kept each year?

MR. HERTZ: Your Honor, I haven't actually counted the ones in the schedules. I would judge that probably about twenty or thirty. Some of the cars are listed on both years, the ones that are carried over, but I counted there were thirty-nine cars leased, of which eight were supplied in a prior year and held over. Thirty-one were supplied during 1950 and '51 and seventeen of the total were carried over into the taxable year '52. The cars which were furnished to various executives totaled thirty-one cars, of which five-- seven having been carried over from the previous period and five from the subsequent period.

MR. FRAZIER: Now, are you reading '50?

MR. HERTZ: '50 and '51. And there were eleven cars furnished which have been taken out, I might mention here, by Mrs. Massey.

THE COURT: In other words, about sixty cars a year.

About half of them were leased to the Atlantic Discount?

MR. HERTZ: Roughly, yes, sir.

THE COURT: In round figures.

BY MR. FRAZIER:

Q Mr. Parks, I hand you a paper here and just ask you to state generally what it is, without going into details? (Handing document to witness)

A (Witness examining document) It's a breakdown showing the gross profits by departments for the years 1950 and '51, and also the total number of units sold during 1950 and 1951 of Massey Motors and Atlantic Motor Sales.

Q Is that new and used cars?

A Yes.

Q And did you prepare that or was it prepared under your supervision?

A It was. I prepared it.

Q And from what source did you take it?

A From the general ledger; general records of the corporation.

Q Do you have that record with you now, the original of that record?

A Yes, I do.

MR. FRAZIER: We offer this in evidence as Plaintiff's Exhibit Number 5.

THE CLERK: 6.

MR. HERTZ: Your Honor, I have no objection to the offer being put in evidence as being relevant, but I don't mean to have the Government stipulate that the figures are accurate or that they reflect what is in the ledger. The witness will have to testify to that.

THE COURT: Well, I think he has testified to that and he has the ledged here with him.

MR. HERTZ: Well, we haven't had an opportunity to verify any of these figures.

THE COURT: I realize that. All right, it is received in evidence as Plaintiff's Number 6.

... And thereupon the foregoing document was received in evidence and marked Plaintiff's Exhibit #6.

THE COURT: The ledger is here for your inspection. It's the basis of the offer of the extract.

MR. HERTZ: Yes, sir.

Q Mr. Parks, I hand you now Plaintiff's Exhibit Number 6 and ask you how many new and used cars were sold by this dealership and its subsidiary in 1950 and 1951?

A In 1950, 4,199 units. In 1951, 5,178 units.

Q Now, Mr. Parks, would you explain how and what procedure was followed in selling company used vehicles during these two years when they were withdrawn from service?

A In the majority of cases, in the majority of instances, the cars were sold before they were ever removed from inventory, in that it was not the intent of the corporation to remove the cars and place them out to the general public for sale.

Q When you say they were removed from inventory, what do you mean; with respect to the company cars?

A Removed from inventory with respect to company cars.

Q You mean from the fixed assets account?

A That's correct.

Q Well, explain --

THE COURT: From Account #167.

THE WITNESS: That's right. From Account #167.

BY MR. FRAZIER:

Q Well, explain that a little more. Were they sold at retail, wholesale, or just what --

A They were sold at retail.

Q I see. Were they, most of them, put out on the used car lot, or what was the situation?

A No. As I just stated, in the majority of cases they were

sold before they were removed from Account 167. They were never placed on the used car lot. They were used as a special favor to replace a car, we'll say, that there had been a total loss on.

Q Would that be true of the cars that were due to model changing and mileage?

A Yes.

Q Now, Mr. Parks, were any expenses incurred by Massey Motors, Inc., or the subsidiary corporation, in the operation and maintenance of these company cars and leased cars?

A With respect to the leased cars, the expense of operation, the lessor stood all of that; in the repair --

Q You mean Atlantic Discount Company?

A That's correct.

Q That's the lessee.

A Excuse me, lessee. They were responsible for all repairs and cost of operation, according to the terms of our agreement. With respect to Massey Motors, yes, there was expense involved in the operation of them.

Q Do you know the approximate amount of that? I mean, in 1950 and '51?

A 1950 and 1951 it ranged between five and six thousand dollars each year.

Q Mr. Parks, do you remember by any chance the-- at

least the month that the model change came in in 1950, or the day of the month, if you remember?

A I believe that your 1949 model came out in December of 1949; and then our '50 model came out, I believe it was November of 1950.

THE COURT: Don't they come out in November or December of the year previous to the one they have the date on ?

THE WITNESS: As a general rule. Not always in November or December. We've had them as early as September and October.

THE COURT: In other words, your 1949 model would come out in November or December of 1948, wouldn't it?

THE WITNESS: That's correct.

THE COURT: Rather than in 1949 as you've said.

THE WITNESS: Excuse me, Your Honor.

THE COURT: It wouldn't be --

THE WITNESS: The 1950 model would have come out in December of 1949.

THE COURT: I wanted-- I was sure it was inadvertent when you said that.

THE WITNESS: Yes, sir.

BY MR. FRAZIER:

Q How about the 1950 model?

A The 1950 model would have come out in November-- in December of 1949.

Q And can you tell us now about the succeeding model?

A The 1951 model came out in December of 1950.

Q And do you remember when the 1952 model came out; the month.

A I believe it was in December of 1951.

Q Now, Mr. Parks, are you generally familiar with the issue we have here in 1951 with respect to this repossession reserve as set up on the books of Massey Motors, Inc.?

A Yes.

Q Well, will you explain to us what-- Well, firstly, what connection is there between the Atlantic Discount Company and Massey Motors, Inc.?

A They are two separate corporations neither one holding stock in the other.

Q How about-- Is there any common control among the stockholders, if you know about that?

A Yes.

Q Tell us about that.

A The principal stockholders are-- Mr. Massey has the con-

trolling stock in both corporations.

Q Well, now, did Massey Motors, Inc. do any financing business with Atlantic Discount during the two years involved in the suit?

A Yes, they did.

Q And what kind of arrangement-- Well, you were the Manager during these years, what kind of arrangement existed between these companies?

A As is customary with all automobile dealers that do business with finance companies, in general they usually do the majority of their business with one company. In our particular case it was with Atlantic Discount Company.

Q Was all your business done with Atlantic Discount Company?

A Not 100%, no. In so doing business with a finance company, you have what is called a reserve agreement whereby you in turn sell your paper to the finance company and they, in turn, pay you a percentage or set up a reserve for you; in the event that contract is paid out and there's no default in it, at the end of the contract they pay you.

Q Now, Mr. Parks, explain that a little more specifically as it applied between your dealership and Atlantic Discount. Take a typical car and give us an example, if you will?

A All right. We sell a car to a purchaser on time. We in turn would draft on the finance company, American Discount Company, for the face, or rather the cash price, that we were expecting from the customer, excluding finance and insurance

charges. The finance company would from the finance and insurance charges set up a reserve which was payable to us when that contract was paid out by that customer.

Q Well, say there was a thousand dollars due Massey Motors, Inc., how much would the finance company present to you under the arrangement that you had with American Discount?

A Under the arrangement that we had, there was always a holdback of 5% of the retail outstanding.

Q So that if it was a thousand dollars, you would get a check for $950.00; is that correct.

A That's correct.

Q And this 5%, or $50.00 as an example, that we've been talking about, what would happen to that now on the books of Massey Motors, Inc.? How would you account for that?

A It would be carried as due from finance company.

Q And would it be included in the gross income of your corporation?

A It would be included in the gross income of the corporation; yes.

Q Well, in what point of time, would you say? When it was paid to you or what?

A No. It was taken up on a monthly basis and shown from month to month.

Q Well, all right. Now, Mr. Parks, what about this amount that we have here, this entry involved in this suit? I will hand you Plaintiff's Exhibit Number 5 and direct your attention to page 7 of this exhibit where there's a notation "Repossession Reserve." (Handing document to witness)

A (Witness examining document) That's correct.

Q Now, you are familiar with that transaction involved there?

A Yes, I am.

Q Explain just what that was and how it was done and --

A Well, the reserve of $2,177.54 which was set up was based on 3% of the $72,584.95 which was due us from the finance company. That $72,584.95 was due us only if all the contracts that were in force paid off with no loss. In the event of a loss, we were to pay the loss and therefore the 3%, or $2,177.54, was set up as a reserve for losses.

Q Now, Mr. Parks, do you have with you in the general ledger the sheet which will show or reflect that transaction in 1951; do you have it with you?

A Yes, I do.

Q You do. Now --

A Reserve was --

Q Speak louder, please. What is that document you have there?

A This is the general ledger of the corporation covering the years 1948 through '51.

Q Now, can you turn and find where the entry of $2,177.54 was set out?

A Yes, I have it.

MR. FRAZIER: Excuse me just one moment. Your Honor, if agreeable with counsel for respondent, is it agreeable that the witness can read from this general ledger without actually offering it and having it admitted in evidence.

BY MR. FRAZIER:

Q Now, Mr. Parks, what account number are you looking at in the general ledger of Massey Motors, Inc.?

A Account number 153, which is "Amounts Due from Finance Company."

Q Now, Explain what that account is all about and why it is in your books there?

A This account represents a reserve on each transaction which is set up by the finance company and due and payable to us when the contracts are paid out.

Q And do you find this entry of $2,177.54 appearing on this sheet?

A No, sir. It appears on our Account number 253-A, which is titled "Reserve for Repossessions."

Q And what is that, sir? What are the nature of the entries in that account?

THE COURT: Is it 3-A?

THE WITNESS: Yes, sir; 253-A.

A It is set up as a reserve for repossessions. In the event that none of the contracts pay out, or rather that a contract does not pay out and there is a loss to the finance company, it is deducted from this.

Q Now, Mr. Parks, refer again, if you will, to the general ledger. I take it there is an account-- What was it, 253-A, that you were referring to?

A Yes.

Q Find that if you will, please. Now, if you know, Mr. Parks, the amount shown on December 31st, 1951 on that ledger card, was that sum of money held by the finance company from Massey Motors, Inc.?

A Yes, it was.

Q And that's the account on which this $2,177.54 entry appears; is that correct?

A That is correct.

MR. FRAZIER: You may examine.

CROSS EXAMINATION

BY MR. HERTZ:

Q Mr. Massey --

A Parks.

Q Mr. Parks, on the sheets that you have before you, do you have any record of the cars which were involved in this proceeding? Is the information apart from the column headings shown on the records of Massey Motors?

A Yes, they are.

Q And are the dates and amounts and so forth substantially correct, to the best of your knowledge?

A Yes, sir, they are.

Q Now, sir, with respect to cars that were taken in-- were acquired from Chrysler Corporation-- did Massey Motors particularly order any cars for the purpose of leasing, or for the purpose of furnishing to executives specific cars?

A Yes, in some instances.

Q And approximately how long does it take to service a car? Put it in condition for use by the user?

A To the general public?

Q Yes.

A Depending on your facilities I would say anywhere from six to eight hours per automobile.

Q Now, sir, if you will refer to those schedules that you have before you, you will notice there is a reference number,

which I may state I have appended to identify these various items. If you will look for the year 1951, item number 107 --

A (Witness complies)

Q On what date was that automobile acquired from Chrysler Corporation?

A That was acquired from Chrysler Corporation on June the 22nd, 1951.

Q And on what day was it furnished to the lessee?

A It was removed from the new car inventory, Account number 131, and furnished to the lessee on July 30, 1951.

Q On July 30th?

A That's correct.

Q I refer to Item number 101 on that schedule. On what date was that acquired from the Chrysler Corporation?

A March 31st, 1951.

Q And on what day was that turned over to lessee?

A May 7th, 1951.

MR. HERTZ: Your Honor, the schedule of leased automobiles which is before me contains other instances of that sort. I won't go-- I have them available but I won't go into it particularly at this point except to ask Mr. Parks:

BY MR. HERTZ:

Q What happened to the cars between the time that they were acquired from General Motors and the time they were turned over to lessee?

A Chrysler Corporation is located in Detroit, Michigan, which is well over a thousand miles from Jacksonville. To transport cars from Detroit to Jacksonville by transport or by train it is necessary that you -- by transport it is grouped in units of four or five, by train by four units. It is not uncommon for a car to come out and to be held in the yard, we'll say, for two or three days awaiting a complete load; in some cases more than that. Then they have to be transported to us and, depending on the mode of transportation, it would take anywhere from, oh, eight to fifteen days to reach us.

Q Now, Mr. Parks, the date shown as date purchased, does that indicate the date on which you received the cars or on which you purchased the cars?

A That is the date of the factory invoice.

Q And say that it may take anywhere from-- how many days?

A Eight to fifteen days before we actually have possession of the car.

Q I refer you to Item numbered 98 for the year 1950-- I'm sorry, the year 1951-- On what date does the record show that was purchased?

A Purchased on April 4, 1951.

Q And on what date was it furnished to lessee?

A April 6, 1951.

Q I refer you to Items numbered 12 and 13.

A Same year?

Q No. I have them numbered consecutively; this would be the year 1950 as a matter of fact.

A I have it.

Q As to those two items, how much of a lapse is there between the date noted for purchase and the date noted for furnishing to the lessee?

A The purchase date on 12 was June 12, 1950; removed on June 12, 1950. 13 was on June 15, 1950 and removed on June 15, 1950.

Q Now, Mr. Parks, if it takes eight days or thereabouts for cars to reach you on the average, what's the explanation for items such as 12, 13 and item 98?

A A direct dealer is not restricted to purchasing all of his automobiles from Chrysler Corporation. He can purchase them from any other direct dealer. It is entirely possible that the units involved were purchased from one of the local dealers, whereby our purchase date and our delivery date could be one and the same.

Q And you make no segregation on your books as to which were purchased from the factory and which are purchased from dealers?

A Only on our, what we call entry journal, which is not technically an official record.

Q Do you know of your own knowledge that any one of these cars, any specific one of the cars, was purchased locally?

A That I couldn't say.

Q Is it a fact, Mr. Parks, that in the case of these leased automobiles the period between the date of purchase and the date of furnishing to the lessee varies all of the way from none to thirty-eight days and back again?

THE COURT: Well, that has been demonstrated.

THE WITNESS: What was the --

MR. HERTZ: Well, he has said that they leave--

THE COURT: That has been demonstrated by your questions. Item 107 showed a thirty-eight-day lapse and these two, 12 and 13, show them on the same date. So that has already been demonstrated.

BY MR. HERTZ:

Q I ask you specifically, Mr. Parks, whether any of those items were held for sale to customers prior to the time they were turned over to the lessee?

A It's entirely possible that they were because all cars that were furnished the lessee were not necessarily ordered out specifically for them. In some cases it was necessary to pull cars from our inventory to furnish-- should they have had an accident, or a car been declared a loss, or should they have

hired a new man to increase their force,-- we didn't sit and hold automobiles in readiness for them to --

Q None of the leased cars-- None of the leased cars were specifically ear-marked from the time of purchase?

A Yes, they were.

THE COURT: Some were and some were not?

THE WITNESS: Yes; some were and some were not.

BY MR. HERTZ:

Q And have you any way of telling from the schedules which you supplied the Internal Revenue Service which were and which were not?

A No, I would not.

Q I refer you to Plaintiff's Exhibit Number 6 about which you were questioned on direct examination. What were the gross sales of Massey Motors during the year 1950?

A $598,470.18.

Q Do you know what the lease income was for that year?

MR. FRAZIER: Excuse me. That was the gross profits, Your Honor, not the gross sales.

THE WITNESS: Excuse me; it was gross profits.

BY MR. HERTZ:

Q I refer you to Plaintiff's Exhibit Number 1, which was

the tax return for the year 1950. What is the net taxable income shown on that return?

A $278,197.87.

Q And what was the lease income for that year?

A The income from leases $5,433.55.

Q Now, on direct examination did I understand you to testify that the leasing arrangement between Massey Motors and Atlantic Discount was a verbal agreement?

A That is correct.

Q To your knowledge, is it a customary practice for people engaged in the leasing business to lease on verbal agreement?

A I would say to my knowledge, yes, because in this case it was done.

Q Apart from this particular case?

A I know of no specific case.

Q Did Massey Motors, to your knowledge, ever lease cars to any one other than Atlantic Discount?

A No, we did not.

Q Do you know, of your own knowledge, when the practice of leasing these cars began?

A Without checking our records, I couldn't say.

Q Do you know whether Massey Motors continues to lease automobiles to Atlantic Discount?

A It was discontinued December 31st, 1956.

Q Now, would you explain to us, Mr. Parks, your duties with the Massey Motors company?

A Yes. I am General Manager of the corporation and, as such, have supervision over all departments.

Q And are you also in a supervisory capacity of the various locations maintained by the company through the City?

A Yes. Not with respect to the subsidiary corporation.

Q No, but with respect to the other used car lots?

A That is correct.

Q Are you also connected in a supervisory capacity, in an advisory capacity, with these dealers to whom you refer?

A Yes, in that a direct dealership does.

Q Is it a fact, Mr. Parks, that Massey Motors maintains certain vehicles apart from those which we are concerned with here which were denominated on the books as being for purposes of emergency service, parts deliveries, and so forth?

A We maintained the usual service vehicles such as wreckers, a service truck, a parts truck, and motorcycles for pickup and delivery service.

Q Were they also used for messenger service?

A We had one that was used for messenger service.

Q To you knowledge how many vehicles were held by Massey Motors during these years?

A I couldn't say without counting.

Q Now, sir, in the performance of your duties with Massey Motors company, is it your testimony that you require the services of an automobile; the use of an automobile?

A That is correct.

Q And is it also your testimony that in accordance with the practice you mentioned on direct examination it is customary for the company to dispose of company cars after they have traveled approximately ten thousand miles?

A That is correct.

Q I refer you to the schedules you have before you and I want to ask you about specific cars as having been furnished for your use.

A Might I state at this point that, since this is a consolidated return, it also contains the cars that were used by the General Manager of the subsidiary corporation, and without checking exactly I cannot specify that I used this one or that one.

Q Well, we will find that out for your memory as to particular items.

A Yes, surely.

Q Now, I call your attention to item 64. What kind of automobile was that?

A Item 64 was not used by me.

THE COURT: Well, that isn't the question he asked.

THE WITNESS: I thought he was asking me about the cars that I used personally.

A Item 64 covers a Dodge Coronet Convertible Coupe, 1951 model.

Q You state that car was not used by you?

A No.

Q I refer you to item 4.

A That covers a 1949 Dodge Coronet Town Sedan.

Q And was that car used by you?

A Yes, it was.

Q On what date was it charged on the books for your use?

A October 31st, 1949.

Q And on what date was it disposed of?

A January 17, 1950.

Q During these years, Mr. Parks, did you use any-- to the best of your recollection, did you use any clube coupes-- any of the cars listed as General Manager's Club Coupe?

A I truly couldn't say.

Q I am trying to shorten the procedure. As you say, there are some of these cars --

A I have used all models.

Q I refer you to item 54 and ask you whether you used that automobile?

A I couldn't state.

Q Would you check item 56. Can you state whether you used that automobile?

A No, I could not.

Q Item 67?

A Again, I couldn't state on any particular one.

Q Except you do know you used item 4. You know you used item 4 that we are talking about?

A Yes, I did use item 4.

Q What is the average mileage put on to a car that you use, a car such as this that you use, per month, Mr. Parks?

A The average mileage, I would say, would be -- oh, I would say anywhere from 1,500 to -- well, approximately 1,500 miles.

Q Is it likely that 10,000 miles would have been put on a car by yourself in a period of seventy-five or eighty days?

A No, sir, but a model change came in there.

Q Is it your testimony that both yourself and the general manager of Atlantic Motor Sales required the services of an automobile?

A That is correct.

Q Is it not a fact that neither yourself nor the General Manager of Atlantic Motor Sales had a car charged out to him for a period of five months between January 12th, 1950 and June 14th, 1950?

A That I couldn't say without checking the records.

Q If the records so shows, would that be correct?

A That would be correct.

Q Is it your testimony you have use for any one more than one car at any one particular time?

A I, as an individual?

Q That's right.

A No.

Q And if the records show that the General Manager, either yourself or the General Manager of Atlantic Motor Sales, had three cars charged out, either one of you or both of you, for a period of six months, what would be the explanation for that?

A For a period of six months?

Q For a period of six months.

A I would say there must have been a mistake; that would be impossible.

Q Is it your testimony that no individual had more than one car at one time?

A Yes.

Q And if the record shows otherwise, it's a mistake?

A I would say yes, to this extent: That quite frequently an automobile when sold for various reasons may not be billed for several days, such as awaiting the bank or other financing institution to approve credit thereon. In a few cases which we did state, have stated previously, a car was removed from inventory before it was sold to a customer, removed from company service.

THE COURT: Removed from company service?

THE WITNESS: That's right.

BY MR. HERTZ:

Q Apart from these items which are a matter of days, if the record states that more than one car was charged out to any one person at any one time, it is your testimony that the record is incorrect?

A There is a possibility that it is incorrect. To the best of my knowledge, at no time were three units charged out to two general managers except under circumstances that I have described.

Q Would that testimony hold true as to the General Sales Manager, to your knowledge?

A Yes, it should hold true.

Q Now, Mr. Parks, who is it that makes the determination for accounting purposes as to which account these various items will be entered into? Who determines whether a particular car that has been furnished to an individual shall be put in the account as an inventory item or as a company car?

A I follow the procedures outlined by Chrysler Corporation's General Accounting System.

Q Who was it that determined that the cars furnished to Mrs. Massey and Bob Massey for personal use --

MR. FRAZIER: Your Honor, we object.

Q (continuing) -- should be carried in the same fashion as the other cars that are here in suit?

MR. FRAZIER: Your Honor, we object to that on the grounds that it is immaterial and irrelevant. There is no issue with respect to any of the vehicles charged to Mrs. Massey and Bob Massey.

MR. HERTZ: Your Honor, the record shows that these cars were similarly --

THE COURT: They were in the same category until today, weren't they?

MR. HERTZ: Until yesterday.

THE COURT: Until yesterday, or whenever it was. It is certainly within the realm of proper cross examination to say that those were in there with these others and to inquire about them.

A As General Manager, I very possibly did myself.

Q Now you referred on direct examination to the question of insurance on the various automobiles. Did I understand your testimony to be that, apart from the leased cars, there was a blanket insurance policy covering all cars, company as well as the cars that were in new car inventory?

A Yes.

Q Did you have occasion from time to time-- Strike that please. With what insurance company is that policy carried?

A At this time I couldn't tell you without going back and checking our records. We have changed companies several times.

Q To your knowledge was it a company whollyindependent of Massey Motors and Mr. Massey?

A Wholly independent, yes.

Q Was it your practice during these years to furnish to the insurance company from time to time any reports as to which cars were held as company cars and which cars were kept in inventory?

A Yes, it was.

Q How often were those reports furnished?

A As I have stated, we have done business with several companies. Some required it; some did not. During these specific years, I couldn't say without checking our records, exactly; but those reports on the uses, where they were required, we were required, when we placed a unit in company use, to so advise them at the time it was placed in.

Q And you do not recall whether that was done for the particular years here in suit?

A No, I don't.

THE COURT: Well, those cars in inventory are just in dead storage awaiting sale?

THE WITNESS: Yes, sir.

THE COURT: And all you would want would be fire and theft?

THE WITNESS: Yes, sir. Actually --

THE COURT: You would have to carry liability insurance on those so-called company cars, wouldn't you?

THE WITNESS: Yes, sir. But actually there is such a policy that covers me, as a principal of the corporation, regardless of whether I get into a new car that is for sale to a customer or a used car or a company-designated car. That is the type we now carry and I don't know whether it's a type that we were carrying at that time or not.

MR. HERTZ: Well, Your Honor --

THE COURT: Excuse me. Let me finish. Certainly

the company carrying the risk-- the insurance company carrying the risk-- would be interested in the number of cars that were out running up and down the highway and subjecting them to risk under their policy, risk of loss under their policy, as opposed to the ones that were sitting up in dead storage and in a fireproof building where there is not much chance of anything happening to them. They would be bound to. It would affect your rate, is what I am getting at; the number that you had in dead storage, the number that you had-- the company cars, the executive cars, whatever you want to call them.

THE WITNESS: With reference to public liability and property damage, yes, sir. On fire and theft-- rather, public liability and property damage, yes.

THE COURT: Even though it's a blanket policy, there has to be some basis to decide what the rate is.

THE WITNESS: Yes, sir. On fire and theft, we do have a monthly reporting form on that.

BY MR. HERTZ:

Q But there is no separate insurance policy for any of the company cars, is that true, apart from the general blanket policy?

A That's correct.

Q To your knowledge during the years here in issue, what was the approximate gross profit margin on an automobile? For example, if a car cost the company $1,956.00 on paper, what is that car supposed to sell for?

A I could just give you a guess or an estimate. The Chrysler Corporation has advocated in their retail price structure a 25% mark up. Not all dealers conform to that because it is a suggested mark up. You take today, for instance, no dealer receives the full retail price, or the suggested retail price, by the factory. He discounts his merchandise below that.

Q In the schedule which we have before us, in the column headed "Sale Price", does that represent the manufacturer's suggested resale or does it represent cash value of what you got, or what?

A It represents the sale price that was placed on the merchandise by us.

Q And are there any instances, to your knowledge, in that schedule where there was a practice of so-called trading along on company cars, allowing over-allowances on trade-ins?

A I wouldn't deny, in a number of cases, yes.

Q Now, in such a case, would the figure shown for sale price represent cash plus the actual value of the car received, or the cash plus the allowance made on the trade-in?

A Well, this figure would represent both.

Q For example, if an executive car was sold for $2,000.00 at a stated price --

MR. FRAZIER: Your Honor, we object. There is no dispute in this proceeding as to what we got for the cars. It is stipulated in the exhibit what we got for them. In the Revenue Agent's report there is no mention at all of any adjustment, or what we did or didn't get for the

cars. For that reason we think it's objectionable and improper and it is irrelevant testimony.

THE COURT: The objection is overruled.

A Will you state the question again?

THE REPORTER: "For example, if an executive car was sold for $2,000.00 --"

Q -- and you received, let us say, $1,000.00 in cash and a used car on which you had placed a value of $1,000.00 for purposes of trade in, which was in fact worth, let us say $700.00, would the price received be stated as $1,000.00 plus $1,000.00 or $1,000.00 plus $700.00?

A $1,000.00 plus $1,000.00.

Q Plus $1,000.00?

A That's correct.

Q And was the car taken in trade written down immediately on the books of Massey Motors?

A No. The cars taken in trade were taken into used car inventory at the same value at which they were traded for.

Q To your knowledge, Mr. Parks, do each of the indiduals, company individuals, who are listed as having received cars during these years have full-time use for one car?

A I would say yes.

Q Does your wife own an automobile?

A Yes, she does.

Q It's a part from the one --

A Yes, it is.

Q Do you drive to and from work in the car which Massey Motors has made available to you?

A Yes. I am on call twenty-four hours a day.

Q To your knowledge is that true with respect to the other executives of Massey Motors company?

A I would say any executive would be on call twenty-four hours a day.

Q Now, I would like for you to refer back to that schedule-- before that I would like to ask you whether it was the practice of Massey Motors to furnish a car at all times to Mrs. Massey?

A Whether or not it was a practice?

Q Yes.

A I would say, according to the records here, yes; she was furnished a car.

Q And if the records show, Mr. Parks, that for a period of several months Mr. Massey was charged with two cars and Mrs. Massey was charged with no cars, what would the explanation be for that, as far as you know?

A Well, just speaking from my own personal experience,

I can't recall any time that Mrs. Massey has been without a personal automobile.

Q And you are not able to explain why the record should show any such thing?

A No.

Q To your knowledge was more than one car at a time ever furnished for Mrs. Massey's use?

A To my knowledge, no.

Q And you would have no way of explaining it if she happened to have more than one car charged out to her at any time?

A Well, yes. On one or two occasions, I think. In one year in question, I don't remember whether it was '50 or '51, we were experimenting with an automobile on interiors, on rebuilding them. And we took the automobile that she was going to use and used it and consequently it would have been held out, and there is a possibility that during that time two cars would have been assigned to her.

Q What kind of car was that you were experimenting with?

A Just a regular stock automobile. We were experimenting with the interior. The interiors to us -- we didn't think the factory had finished them off quite the way they should. In fact, we converted a number of them.

Q Did Massey Motors maintain a truck franchise during these years?

A Yes, we did.

Q And did you have during both of these years an executive known as a New Truck Sales Manager?

A Yes, we did.

Q And did he have use for an automobile?

A He certainly did.

Q Would you have any explanation for the fact that--- If the record shows that he had two cars for three and half months and no cars thereafter, would you have any explanation for that?

A I would say, no cars thereafter. I don't remember whether it was during these two particular years that we abolished the job of the New Car Sales Manager-- I mean the New Truck Sales Manager-- or not. If there was no car thereafter, apparently it was; I mean we did abolish his job.

Q What were the functions of an individual known as the Transport Manager?

A During the first, I believe--the record will verify this, about ten months of 1950, we operated our own fleet of transports in hauling automobiles.

Q And for what period of time did that continue?

A It was either the first nine, or first ten, months of 1950. We didn't haul all of our own merchandise, but as much of it as we could.

Q And did that person have a car at his disposal as long as he was with the company?

A Yes, because we had transport trucks operating between here and Detroit, Michigan, and he was on call all the time.

Q Mr. Parks, which of the individuals classed as executives of Massey Motors are actually engaged in direct selling of cars?

A I would say all officials are engaged indirectly, primarily, I would say, your Sales Managers would be the ones that would be principally actively engaged in selling.

Q To your knowledge, does Mr. Massey engage to any extent in direct selling of cars?

A He's an automobile dealer; yes.

Q On the floor of the --

A He does not compete with the salesmen, if that's what you mean.

Q Is that true as to yourself?

A That's right.

Q Is that true as to the Vice President?

A I would say yes.

Q And the only individual then among the executives that would be engaged in direct selling on any substantial basis is the Sales Manager?

A Well, all management at one time or another are called on because of friendship or business relations to sell automobiles. There isn't, I don't believe, a month that goes by that I don't sell, yet I don't compete with the salesmen.

Q Now, who in the general sales force of Massey Motors had authority to show one of these cars, one of these company cars, to a prospective customer?

A How do you mean who had the authority to show them?

Q Suppose a man came-- Suppose I came in to Massey Motors during these years and saw a salesman on the floor and I told him, "I am interested in purchasing one of these so-called executive cars." Would the salesman have authority to take me out in back to show me a car that was sitting there, presently charged up as having been used by one of the executives?

A Well, I would say that any car that was parked on our premises, the customer could look at it.

Q Did the general salesmen have authority to close the transaction for the sale of such a car?

A All sales are approved by the top management. A salesman may make a sale on anything he so desires, but the sale is not consummated until completely approved by the house, or top management.

Q Are the salesmen in any way notified that certain company cars are considered available for sale to the public?

A There have been times when cars were short in supply.

Q Have you ever personally sold one of the cars charged to you?

A Have I ever personally sold one?

Q Yes, to a general customer?

A My answer would be no.

Q To your knowledge, did Mr. Massey ever sell any of the cars charged to him personally?

A I would say yes.

Q In the case of cars charged to you, who arranged for the sale of those cars?

A It could have been any one of the salesmen or sales manager, or even Mr. Massey.

Q They had authority to show that car and consider it available for sale?

A They had authority to submit the transaction on any automobile in our place.

Q And do you, as General Manager, consider those automobiles available for sale to the public?

A In the general course of business, no.

Q You say they were used-- On direct examination you testified these automobiles were used for approximately ten thousand miles?

A Approximately.

Q When an automobile had been used for ten thousand miles, how was it disposed of?

A As a general rule, when a car started to approach the ten thousand mile bracket, the salesmen were so notified that it was going to be available for sale, and if they had any one that was interested in it they might see if they could sell it.

Q Did it ever take, to your knowledge, three years to arrive at a ten thousand mile figure on any of these cars?

A We didn't keep any units except service units for a period of three years.

Q Was it your general experience that these cars were resaleable; the cars furnished to executives?

A Yes.

Q Mr. Parks, let us suppose that a customer comes into Massey Motors and wants to see a particular feature which is not available in the cars held by the salesmen. If such a feature, for example, in this day, power brakes or air conditioning and so forth, is available in one of the company cars, is that shown to the customer?

A Again, I would say that any automobile that would be on the premises, whether it would be mine or even a customer's car, if you came in and wanted to see air conditioning, I would be glad to open the door and show it to you.

Q And would you drive me around the block to see how it felt?

A Well, company cars that are placed in company service are not in the demonstrator class, and all of our salesmen maintain their own demonstrator.

Q I am referring specifically to features not contained in the salesmen's cars.

A I would say on occasion, as you would find with any automobile occasionally, you are going to let someone get in. Any time that I'm out and if you are going with me, I will suggest that you drive my car because I would like for you to see how it operates.

Q Is it not a fact, Mr. Parks, that Chrysler Corporation generally makes available to Massey Motors cars for things like parades?

A They do not.

Q. And did not during these years?

A They have never, not to my knowledge.

Q What type of cars are furnished for parades?

A We have used all types; trucks, open cars, closed cars; we recently had some in, I believe, the last parade we had here in Jacksonville that were sedans.

Q And how often are such parades held?

A Periodically, depending on the times.

Q You made reference to a school held at the University of Florida?

A That's correct.

Q Who was required to attend that school?

A Actually it was a school sponsored by Chrysler Corporation.

Q For whom?

A Any authorized mechanic of a dealership, of a Chrysler Corporation dealership, who would pay the enrollment fee could attend.

Q How many people went from Massey Motors?

A We had three men.

Q How many?

A Three.

Q Three men?

A That's correct.

Q How many people normally attend the factory meetings, such as the one you referred to in Atlanta?

A Well, in Atlanta that was the showing of the new model automobiles, and in such a case you always take all of the salesmen that you can, plus your top management, because that is your first view of new model automobiles and they usually indicate what their policies for the year will be.

Q How large is the sales force at Massey Motors?

A At present we have, I would say --

Q During these years? During the years in question.

A It varied during those years. I would say ten to twelve.

THE COURT: That's new and used car salesmen?

THE WITNESS: Yes, sir.

THE COURT: And truck salesmen?

THE WITNESS: It probably would have gone higher than that with the truck salesmen.

BY MR. HERTZ:

Q And did substantially all of these people attend such meeting, the showing of the new models?

A Oh, yes.

Q And that happens once a year?

A Well, yes, in that it's once-- it was once for Dodge; once for Plymouth, and once for Dodge trucks, so you have three such meetings.

Q To your knowledge, does Massey Motors personally warrant the executive cars that are sold with the equivalent of a new car guaranty?

A Yes, I would say we do. We do that with any late current model automobile as a general rule.

Q That includes all of the used cars you have for sale?

A That is correct.

Q And these are not treated any differently?

A No.

Q To your knowledge, Mr. Parks, was Massey Motors at any time during these years itself engaged in the finance business?

A No, we were not.

THE COURT: Suppose we take a few minutes rest break.

... And thereupon a short recess was had at the conclusion of which Court reconvened and the following further proceedings were had:

BY MR. HERTZ:

Q With reference to the cars that were leased to Atlantic Discount Company, is it a fact that Atlantic Discount Company had some of these cars under lease for substantially less than 40,000 miles?

A Twelve months or 40,000 miles, I believe.

Q And substantially less than either?

A In the majority of cases I would say no; not substantially less.

Q And if the record shows such instances do exist, do you have any explanation for it?

A I doubt if you would find but maybe one or two exceptions in two years.

Q We will let the record speak on that point. According to the exhibits you have furnished, the leased cars were carried as having been leased until the very date that they were sold?

A Yes.

Q As a practical matter how was the sale of the leased cars --

A They were sold at retail.

Q Were they shown while still in the possession of Atlantic Discount Company?

A In the majority of cases on the sales of these automobiles this was during a period when cars were still very scarce; there was no trouble to move them at all.

Q Were there occasions when any of these leased cars were surrendered and put on used car lots?

A Maybe for a period of two or three days.

Q Otherwise they were sold right from the possession of Atlantic Discount Company?

A In some instances, yes. The adjusters themselves sold them or bought them.

Q In the case of a general customer that came into Massey Motors and was interested in such a car, was it understood by

the salesmen that they could show those cars?

A They could not. They were not available for sale.

Q Were they then sold sight unseen?

A They were not-- You mean, could the salesman take a customer over to the finance company and show him an adjuster's automobile?

Q Yes.

A No.

Q I would like to clear the matter up, Mr. Parks. The record shows that Atlantic Discount had charged to it a certain car, one of the cars in question, up to a particular date.

A Uh-huh.

Q Now, on a certain date, they were charged as having been sold.

A That's correct.

Q Am I correct in understanding that people don't normally buy used cars without seeing them?

A As I stated, there could have been a lapse in there of two or three, or possibly five, days; but never over ten days did we hold on to those automobiles.

Q Then the cars, as a general practice, were taken back from Atlantic Discount and put on and shown at Massey Motors?

A In many cases, yes.

Q Was that true as to the cars furnished to the executives of Atlantic Discount ?

A As a general rule, no.

Q Are you familiar at all, Mr. Parks, with the rental rates, or leasing rates, for automobiles; commercial leasing rates on automobiles?

A I am not at present.

Q Did you have any knowledge of it during these years?

A Yes, we did, because we contemplated leasing to several other organizations-- Foremost Dairies for instance.

Q What are the terms on which automobiles were leased in that period?

A Depending entirely on the agreement as to repairs and upkeep and general maintenance, the figure we had arrived at of three cents a mile I believe was being used at that time by one or two of the car rental agencies.

Q Based on 40,000 miles at three cents a mile, the company would realize income, rental income, in the amount of $1,200.00 during the course of the year on a car; is that correct?

A That's right.

Q To your knowledge, during that year would the depreciation on that car in fact exceed the rental figure?

A Might I add that no two automobiles can you price the same because they never come back in the same condition.

Q I am speaking of depreciation that you charged off on the books on a monthly basis?

A Yes.

Q Did the depreciation on the average car so furnished exceed the amount of the rental?

A No. I believe your rental would run a little more than your depreciation.

Q Would there be any substantial difference between the two figures?

A No, there wouldn't be a great deal.

Q Now, directing your attention for one moment to this matter of a reserve, you were referred to the general ledger accounts. I have one or two questions with respect to that. When was this reserve set up for the first time?

A When we first entered into an agreement with Atlantic Discount Company for them to buy our paper.

Q I am speaking of the $2,100.00 that is in issue for the year 1951; is there a similar item in the books of the company for the year 1950?

A There is not.

Q There is not. Did the finance company in fact owe money to Massey Motors under a withholding agreement as

of the end of the year 1950?

A Yes.

Q Is there any similar reserve for subsequent years?

A No, there is not, because it was ruled out.

Q I would like to ask you a question with respect to the two accounts that you referred to, the one showing the total --

A Reserve.

Q -- the total amount owed by the finance company to Massey Motors, and the other one the $2,100.00 item. Is the total amount actually owed by the finance company shown in the larger account? In other words, did they owe you? Would you refer to the exact figure?

A Yes.

Q As of December 31, 1951, what was the total amount withheld by the finance company and forthcoming from Massey Motors?

A The amount at the end of 1951 was $72,584.95.

Q Now, is the other account that contains the $2,100.00 item based on a percentage of that figure?

A Yes, it is.

Q The finance company did not owe you $73,000.00?

A No, they did not.

MR. HERTZ: That's all the questions I have of the witness at this time.

BY THE COURT:

Q Could you say that the $2,100.00 figure is 3% of the $72,000.00; is that what that is?

A Yes, sir.

Q $72,000.00 is 5% of the face amount of discounting contracts? That is in substance correct?

MR. HERTZ: Yes, sir.

A That is correct.

Q And the $72,000.00 item-- the books were kept on an accrual basis and that was taxes paid on the $72,000.00?

MR. HERTZ: That was the testimony of the witness. We will try to straighten that out.

REDIRECT EXAMINATION

BY MR. FRAZIER:

Q Mr. Parks, just two or three questions here that relate to some of that cross examination that I want to try and clear up. Firstly, there were several questions asked with reference to the fact that by looking at the exhibits which we have, particularly those two large schedules for 1950 and 1951-- and I think they are Plaintiff's Exhibits 3 and 4-- it appears that possibly more than one automobile was assigned to one particular category of management, or one person?

A Yes.

Q Is that correct?

A Well, I might say --

Q Explain what that situation is. Do you assign more than one car to one individual, for example yourself, at any one time?

A Technically, no. The automobiles are used principally in the operation of the business and there are a few exceptions whereby it was necessary, in one particular case that I recall, to let one of our very good customers have an automobile, I think it was for almost a two-month period. We couldn't put a man out of his automobile in the operation of our business to loan his car out.

Q So you assigned him another one?

A That's correct.

Q So the records would show two cars?

A That's right.

Q Eventually one would be disposed of, I take it?

A That's correct.

Q Now, Mr. Parks, with respect to this leasing: If I recall your other testimony, was this a net lease? Did Atlantic Discount furnish its own maintenance or repairs on these cars?

A They were free to get their maintenance and repairs at

any place they so desired, because they had cars all over the State of Florida.

Q Who paid for that maintenance under the arrangement?

A They paid for the maintenance, themselves.

Q How about the insurance?

A They paid for their own insurance.

Q Who bought their oil and gasoline?

A They did.

Q In other words, it was a net rental?

A That's right.

Q Except for depreciation, did you have any other expense against that rental operation?

A No.

Q Now, Mr. Parks, during the cross examination there was some-- By virtue of the questions propounded to you, there was an implication raised that these company cars-- and for that matter the leased cars-- we are talking about were held principally for sale rather than principally for use in the business. Now, can you explain what was the principal purpose for which these cars were held?

A They were held for the operation of our business as automobile dealers.

Q Let me ask you this: Based on your experience, having managed this business and so forth, do you believe that you could operate a successful retail automobile agancy the size of Massey Motors without having these company cars at your disposal?

A No, sir, I could not.

MR. FRAZIER: Thank you. That's all I have.

RECROSS EXAMINATION

BY MR. HERTZ:

Q With respect to the leased cars, your testimony was that you had no expenses. Does that apply to sales expenses, too; sales of the cars?

A Sales expense, yes, would be involved.

THE COURT: I don't understand that.

MR. HERTZ: There was testimony that this was a net rental and Massey Motors had no expenses connected with those leased cars, but they do at least have sales expenses.

THE WITNESS: Operating expenses.

MR. HERTZ: When they dispose of them.

THE COURT: When they take them back and sell them, why, they are paying the salesmen; is that what you mean? Is that what you are talking about?

MR. HERTZ: Yes.

THE COURT: I just didn't understand it. They have to sell them when they take them back, is what you are talking about?

MR. HERTZ: According to the records-- according to the books, they were never put back. They were sold right out of the possession of Atlantic Discount. That is what the exhibit furnished to the Government reflects.

THE COURT: I don't know how there would be-- What puzzles me, I don't know how there would be of necessity any bookkeeping operation showing that they took them back. Suppose they did take them back and had them on their lot a couple of days, it would not be reflected in the books unless there was a bookkeeping entry transferring them to their used car inventory, and that was made and then they were sold out of the used car inventory. If they just simply took possession back, why, there would not be necessarily any entry about it, would there?

MR. HERTZ: That would be so, certainly, Your Honor.

THE COURT: I don't think you can, from the books, you can decide whether a car was sold right out from under one of these adjusters or whether the adjuster dropped it by there and they kept it a day or so and sold it. I don't think it's possible to decide that; not in anything that has been suggested so far.

MR. HERTZ: No. And the reason I asked the questions on the book entries was that the only piece of documentary evidence offered by the taxpayer is that exhibit.

THE COURT: Some of them, I guess, as to these executive cars-- Am I correct in this, that some of them would actually be transferred from this executive or company car account to the used car inventory and then sold; was that the case, Mr. Parks?

THE WITNESS: No, sir; we did not.

THE COURT: You did not?

THE WITNESS: No, sir.

THE COURT: You just simply sold them?

THE WITNESS: That's correct.

THE COURT: And transferred the title that had been issued to Massey Motors to the purchaser?

THE WITNESS: That's correct.

MR. HERTZ: The difficulty is, Your Honor, the record shows there is no consistency at all about the period in which any of these cars were leased or company cars; hence the initial questions I asked.

THE COURT: Yes. I realize that that goes to the ultimate bearing on the ultimate question here-- the primary purpose for which they were held. The inconsistencies in all those matters, in fact the very number of them, would go to the purposes for which they were held.

MR. FRAZIER: One other question, Mr. Parks. I want to get that straight. That's a pretty important point.

BY MR. FRAZIER:

Q I believe we went into this on direct examination as to the accounting procedure with respect to company leased cars. If I understand it correctly, the cars were removed by accounting entry from the new car inventory and placed in the fixed assets account; is that true?

A That is correct.

Q And did they not remain there at all times until sold to whoever bought them?

A Yes.

Q They were never retransferred to either the new car or used car inventory?

THE COURT: It is clear now. It is cleared up by my last question.

MR. FRAZIER: Thank you.

BY THE COURT:

Q I am no bookkeeper and I don't understand very much about bookkeeping but I suppose that the fixed assets account, as you call it, it is a capital account?

A Yes, sir.

Q And that the money realized from a car sale would go into that-- would be reflected in that account?

A Yes, sir.

MR. FRAZIER: It would be just like the sale of a typewriter.

THE WITNESS: That's right.

THE COURT: They sell a car, say, for $3,000.00 to themselves for the use of a man, say Mr. Parks or somebody else, which runs six or eight or ten or twelve months; and maybe they can sell it to the public again for $3,000.00. That $3,000.00 goes into that fixed assets account, capital account, there in lieu of the automobile.

MR. HERTZ: It's a double-barreled entry. They have got to get it into the cash account and debit the cash, then they credit the fixed assets account. It is a double-barreled entry to get the depreciation out of the reserve.

THE COURT: I am not going to try to take a course in bookkeeping this afternoon.

MR. HERTZ: Excuse me, Your Honor. There is one thing with reference to that bookkeeping. The money received for company cars being reflected in the asset account. I suggest, Your Honor, that your treatment of the price received on these company cars is not what it would have been in any other business where you were selling a capital asset. They were selling an asset and took a trade-in. The trade-ins were not capital assets, they were to be held for sale; and under the Code it is a sale or exchange of a capital asset for non-similar property. Now, theoretically at least, they should have valued the cash plus the actual fair market value of the car taken in trade and that would have represented presumably a capital loss; and they should have written down on their books the value of the traded-in car, its fair

market value when it was acquired, and showed no later ordinary loss upon the disposition of the used car.

THE COURT: Instead they did it the other way, as I understand it. I gathered that from some of your cross examination.

MR. HERTZ: The difficulty is it represents a substantial difference because the gain that is reported when you take in a more or less paper profit is a capital gain and is taxed at 25% and the loss would come out at 50% of ordinary income. And there is a substantial tax difference.

THE COURT: Yes, sir.

HOWARD LEWIS LUMPKINS,

having been produced and first duly sworn as a witness on behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION

BY MR. FRAZIER:

Q Would you state your full name for the record, please, sir?

A Howard L. Lumpkins.

THE COURT: What is that surname?

THE WITNESS: Lumpkins.

Q Mr. Lumpkins, what is your trade or occupation?

A I am Secretary and Treasurer of Atlantic Discount Company.

Q How long have you been so engaged?

A Since May of '52.

Q During the years 1950 and 1951 where were you employed?

A I was engaged as Office Manager and Treasurer of Atlantic Motor Sales and Massey Motors.

Q As Office Manager, did you supervise or do part of the bookkeeping for this automobile agency?

A Yes, sir.

Q And from that you are familiar with their books and records in those two years involved in this suit?

A Yes, sir.

Q Now, Mr. Lumpkins, the method by which finance transactions are handled between Atlantic Discount and Massey Motors is familiar to you?

A That is correct.

Q Is there any difference that you know of between the date that you began working at Atlantic Discount and the years involved in this suit?

A They are more or less the same. The percentages or the hold-backs may vary.

Q Now, was there any financial arrangement between the automobile company, Massey Motors, Inc., and Atlantic Discount Company during these years?

A Yes, there was.

Q And you have one now, I take it; is that correct?

A Yes, sir.

Q All right. Now, explain just what that arrangement is and how it operates, if you will, please, sir?

A Now or in '50 or '51?

Q Explain how it operates --

A In general?

Q Yes, in general. If there was any difference in 1950 or 1951 that you know about, tell us about it.

A In the ordinary course of business a customer will purchase a car from Massey Motors. Let's assume that the car sells for $2,000.00. The customer pays a thousand dollars down and finances $1,000.00 He signs a contract with Massey Motors for a thousand dollars, plus finance charges and insurance. Massey Motors takes that contract and discounts it or sells it to the Atlantic Discount Company. Out of the finance charge and the insurance charge, there is a certain percentage held back on Massey Motors as dealer's loss reserve. That reserve is not payable to Massey Motors theoretically on each individual account until that particular account is paid in full. On a recourse arrangement you usually use composite amounts, you might say --

Q Just a moment. What's a recourse arrangement?

A A recourse arrangement is where the selling dealer has to repurchase the car in the event of repossession for the unpaid balance from the finance company.

Q Is that arrangement -- Was that arrangement in these years followed between these two companies?

A It was; yes, sir.

Q Now, did you bring with you the original ledger sheets, or subsidiary ledger sheets, of Atlantic Discount Company which show these transactions for 1950 and 1951?

A I have '51.

Q For '51 only?

A Yes, sir.

MR. FRAZIER: Your Honor, we offer as Plaintiff's Exhibit 7 the original ledger sheets of Atlantic Discount Company showing the financial transactions with Massey Motors, Inc. for the year 1951, which is the year we have this matter in question.

MR. HERTZ: Your Honor, I respectfully suggest that the amount shown on Atlantic Discount's books as being due to Massey Motors is not in issue here. The question is what was shown on Massey Motors' books, and we have that in evidence already.

MR. FRAZIER: I want the witness to explain how those transactions are handled.

THE COURT: I don't think it makes any-- it hurts any to have it in evidence. What number are you giving it?

THE CLERK: 7.

The foregoing document was received in evidence and marked Plaintiff's Exhibit #7.

BY MR. FRAZIER:

Q Mr. Lumpkins, handing you back Plaintiff's Exhibit 7, I will ask you to state in general what is shown on those records? What do they purport to reflect? (Handing document to witness)

A (Witness examining document) This reflects the date of each individual transaction purchased from Massey Motors, showing the customer's name-- that is, the customer who purchased the car and financed it-- and the amount of the holdback on that particular account.

Q What is the balance on that as of the end of the year, December 31st? First, give me the balance on November 30th?

A November 30th, $72,955.70.

Q And what is it on December 31st?

A $74,916.12.

Q How was that account reflected on the general ledger of Atlantic Discount Company? What classification?

A It is a liability account on the finance company books.

Q In other words, it represents money due --.

A It represents money due to Massey Motors if each account pays out. It's a continuous idea.

Q I see. And do you have similar arrangements with unrelated dealers, or dealers where there is no continuity of interest?

A Yes, sir. It's a standard financing agreement.

Q Does it work exactly the same, or substantially the same?

A Yes, sir.

Q Just forgetting a moment there is any connection between Massey Motors and Atlantic Discount, if a representative of Massey Motors would come into your office and make a demand for that seventy-some-odd-thousand dollars as of December 31st, would he get it?

A No, he wouldn't.

Q When would he get it, if ever?

A We would determine what is payable three times a year, according to our agreement, which is January, July and October. At that time we run an adding machine tape of every account that is purchased from Massey Motors that is still outstanding.

Q Yes, sir.

A We take that total amount, which I believe for instance

in January of 1951 was $1,200-some-odd-thousand that they were contingently liable to us for; in January of that year we were maintaining a 3% hold-back. We took 3% of the $1,200,000.00, which would come to approximately what -- $36,000.00. From that balance on our records on January 31st, which was $47,000.00, we substract the $36,000.00 hold-back and pay them the excess of $9,808.00. That's done three times a year.

Q I see. Continue, please.

A Now, the $74,000.00 is reflected at the end of December and a part of that was actually payable to them, but the time of paying it had not arrived.

Q Well, as I understand it then, on December 31st, 1951 an amount equivalent to 3% of the total amount of paper, as we will call it, for which Massey Motors was continually liable, would be held by the --

A At December 31st, it was 5%. The early agreement was changed in July of '51.

Q It would have been 5%?

A It would have been 5% of approximately $1,300,000.00.

Q And if the balance in that account was in excess of that 5%, it would be remitted to Massey Motors; is that correct?

A That's correct.

Q And the balance would be held?

A Yes, sir.

Q And that's true with other dealers -- other arrangements with other dealers?

A That's right.

Q And did Atlantic Discount handle financing for other dealers, other than Massey Motors, the same way?

A Oh, yes.

Q Now, Mr. Lumpkins, I want you to take the general ledger of Massey Motors, Inc. You were in the Courtroom when Mr. Parks testified about that Account 253?

A Yes, sir.

Q You were the Office Manager during '51 at Massey Motors, weren't you?

A Yes, sir.

Q And you are familiar with those records. Now, explain to us for the benefit of the Court just how this transaction is reflected on Massey Motors' books that we have been talking about?

MR. HERTZ: Your Honor, I don't know whether this is cumulative or whether he is trying to impeach the testimony of his own witness.

THE COURT: I don't know that it has fully been explained by the other witness. He told me that he had a witness that could explain it.

MR. HERTZ: If Your Honor please, the previous wit-

ness testified how much Massey Motors' books showed was due to it. He said that the amount had been returned and the total of the income, and with the exception of the fact that a reserve of 3% of that amount had been set up on the books; and I think that --

THE WITNESS: I think we can say the same thing a little bit more clearly.

MR. FRAZIER: That's what I am trying to do.

THE COURT: The objection is overruled.

A At the end of each month Massey Motors calls Atlantic Discount Company to arrive at the amount of hold-back set up on their books during that particular month.

Q In other words, to verify it with your records; is that it?

A We send them a copy of each particular deal. They know what it is and they verify the amount with our records so we will be in conjunction all the time.

Q You mean in agreement?

A In agreement, right. The bookkeeping entry at that particular time on Massey Motors' books, assuming the reserve or the hold-back was, say $3,000.00 for the month of January, Massey Motors would debit an asset account called "Due From Finance Companies."

Q Is that an accounts receivable?

A That's an accounts receivable. They would credit a reserve called "Repossession Losses" account, which is a re-

serve account on the liabilities section. Then that is carried along until the end of the year, mainly from a matter of personal preference not to pick up that profit each month; let each month stand on its operational income and not miscellaneous income. On December 31st of each year, that reserve for repossessions-- the amount that has been set up for the entire year-- is taken up in the miscellaneous, or ordinary income, and credited to that charge back out of the reserve account to zero. Now, in the year 1951, 3% of the seventy-two-odd thousand dollars was set up as a reserve.

Q Now, let's get this point straight. On December 31st, 1951 there was some seventy-four thousand dollars in the reserve account; is that right?

A Right.

Q And that represented moneys being held by Atlantic Discount?

A That's right.

Q All right. Now, what happened to the difference between the $74,000.00 and this $2,100.00 entry we have been talking about?

A It went into ordinary income.

Q In other words, Massey Motors picked it up as ordinary income; is that correct?

A Correct.

Q And washed this out, in effect, from the reserve account except for the $2,100.00?

A Except the $2,100.00. There shouldn't have been any reserve at all. It should have been 3% of their contingent liability of a million, two or three hundred thousand dollars, and not 3% of the possible income that they may receive on it.

Q In other words, it would have been the full $74,000.00?

A Right. Except, I would say, $74,000.00, it should have been 3%, or 5%, of the liability. The seventy-four might have been in excess.

Q I see. If the total contingent liability were $1,000,000.00 at the end of December, they should have kept in the reserve account how much, 5% of that?

A 5% would have been $50,000.00

Q And the excess over that they would have done what with? Taken it out --

A Taken it up in the income. That's all they were liable for.

MR. FRAZIER: Thank you. That's all I have.

MR. HERTZ: No questions.

THE COURT: Come down.

(witness excused)

MR. FRAZIER: Your Honor, that's all I have.

THE COURT: Has the Government anything?

MR. HERTZ: The Government offers no witnesses.

THE COURT: Do you want to argue this matter this afternoon or not?

MR. HERTZ: I am going to be here at Your Honor's convenience.

THE COURT: You are going to be here in town, and I don't want to keep everybody here late tonight. It is almost five-thirty. I suggest that you gentlemen appear here at ten o'clock in the morning and I will hear the arguments before we start these other two cases. I have two cases still set for tomorrow and we have a matter here of sentence at nine-thirty.

THE MARSHALL: Yes, sir.

... And thereupon Court adjourned to be reconvened at 10:00 o'clock in the forenoon, Thursday, February 21, 1957.

— — —

... And at 10.00 o'clock in the forenoon, Thursday, February 21, 1957, Court reconvened pursuant to adjournment of the preceding session and the following further proceedings were had:

THE COURT: Mr. Frazier was about to start his argument yesterday afternoon. Isn't that about where we left off?

MR. FRAZIER: Yes, sir.

(CLOSING ARGUMENT BY MR. FRAZIER)

(CLOSING ARGUMENT BY MR. HERTZ)

(REBUTTAL ARGUMENT BY MR. FRAZIER)

THE COURT: I want an opportunity to examine these exhibits and I think all I want from counsel on either side, if you furnish me with a list of citations of the applicable authorities rather than working up a comparison of the testimony.

MR. HERTZ: In letter form?

THE COURT: It will be all right for each of you to address a letter setting forth the authorities and citations which you rely on.

Thank you, Gentlemen.

... And thereupon the trial of this cause was concluded.

— — —

CERTIFICATE

I, JOHN A. VIGNEC, Official Reporter, United States District Court, Southern District of Florida, DO HEREBY CERTIFY that I personally recorded, stenographically and by electronic recorder, the foregoing transcript of the proceedings herein set forth; that the same was reduced to typewriting under my supervision, and that the foregoing pages, numbered 1 through 86, inclusive, constitute a true and correct transcript of my shorthand notes.

JOHN A. VIGNEC.

CIVIL ACTION NO. 3346-CIV.-J

FILED JACKSONVILLE, FLA., OCTOBER 7, 1957

JULIAN A. BLAKE, Clerk

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This suit for the recovery of corporate income taxes and interest thereon was tried to the Court without a jury. From the pleadings, exhibit, testimony and argument and memorandum of counsel, the Court makes the following

FINDINGS OF FACT

1. Plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Florida, with principal office at 830 Main Street, Jacksonville, Duval County, Florida.

2. This action is one to recover a corporate income tax and interest thereon erroneously or illegally assessed and collected without authority under the Internal Revenue Laws of the United States, pursuant to the authority conferred to sue under Section 1346(a)(1) of Title 20, United States Code, as amended.

3. That on or about May 12, 1951, Plaintiff filed with and in the office of the then Collector of Internal Revenue for the District of Florida at Jacksonville, Florida, its corporate income tax return Form 1120 for the calendar year 1950 and duly paid to the said Collector, the corporate income tax shown on said return to be due and owing by the Plaintiff to the United States Government; that on or about October 20, 1954, the Commissioner of Internal Revenue assessed additional corporate income tax and interest against the Plaintiff as fol-

lows: Income tax in the amount of $3,012.99 and interest thereon in the amount of $650.27; that this additional income tax and accrued interest thereon were paid by the Plaintiff to the United States Government on the dates of October 20 and 27, 1954, in the aggregate amount of $3,663.26.

4. That on or about March 15, 1952, Plaintiff filed with and in the office of the then Collector of Internal Revenue for the District of Florida at Jacksonville, Florida, its corporate income tax return, form 1120 for the calendar year 1951 and duly paid to the said Collector the corporate income tax shown on said return to be due and owing by the Plaintiff to the United States Government; and that on or about October 20, 1954, the Commissioner of Internal Revenue assessed additional income tax and interest thereon against the Plaintiff as follows: Income tax in the amount of $4,918.46 and accrued interest in the amount of $766.40; that this additional tax and accrued interest thereon were paid by the Plaintiff on October 20 and 27, 1954, in the aggregate amount of $5,684.86.

5. That on February 3, 1955, Plaintiff filed a claim for refund in the amount of $3,663.26, plus interest, of the tax and interest paid for the calendar year 1950.

6. That on February 3, 1955, Plaintiff filed a claim for refund in the amount of $5,684.86, plus interest, of the tax and interest paid for the calendar year 1951.

7. The said claims for refund were rejected by action of the Commissioner of Internal Revenue by letter dated July 18, 1955.

8. The Plaintiff during the period herein involved operated under a franchise from Chrysler Corporation for the retail sale of Plymouth and Dodge automobiles and Dodge trucks, and

as a wholesale distributor of these automotive products for Chrysler Corporation in Duval, Clay, Baker and Nassau Counties, Florida, and Camden and Charlton Counties, Georgia, all located in and around the Jacksonville, Florida trade area.

9. The Plaintiff as a distributor for Chrysler Corporation appointed associate dealers in several of the counties included in its sales area. Under this arrangement the Plaintiff purchased all merchandise from Chrysler Corporation, and it in turn sold the same to its associate dealers. During the calendar years 1950 and 1951, the Petitioner had three associate dealers located in Green Cove Springs and MacClenny, Florida, and Kingsland, Georgia.

10. Under Plaintiff's distributorship arrangement, Chrysler Corporation had no authority to sell merchandise directly to an associate dealer, nor did a representative of Chrysler Corporation have authority to call on an associate dealer without a member of the Plaintiff's staff being with him. The Plaintiff as the distributor also helped its associate dealers in sales promotion work in connection with the sale of Chrysler automobiles, trucks and parts. In general, the Plaintiff supervised the operation of its associate dealers in much the same way that Chrysler Corporation supervised and directed its retail dealers.

11. During the years in question, the Plaintiff employed between 85 and 120 persons. The principal office of the Plaintiff was maintained at 830 Main Street, Jacksonville, Florida. Its servicing and parts department and body shop were located at 35 West State Street; the used car lots were located at 36 West State Street, 1248 Main Street, and 2131 West Beaver Street. A warehouse was located at 8941 Main Street, all at Jacksonville, Florida.

12. The Plaintiff owned all of the outstanding stock in a subsidiary corporation known as Atlantic Motor Sales, Inc., located on the South side of the St. Johns River in Jacksonville, Florida, at 1524 San Marco Boulevard. The subsidiary corporation maintained a used car lot in the 2000 block of West Beaver Street and a used car lot on Miami Road, both in Jacksonville, Florida. The subsidiary corporation was also a direct dealer of Chrysler Corporation and handled approximately the same products as those sold by the Plaintiff.

13. For the taxable years involved, Plaintiff and its wholly owned subsidiary, Atlantic Motor Sales, Inc., filed consolidated corporate income and excess profits tax returns.

14. The sources of Plaintiff's income and gross profit of each of its departments for the calendar years 1950 and 1951 were as follows:

MASSEY MOTORS, INC	1950	1951
New Car Department	$ 527,929.76	$ 557,699.48
Used Car Department	154,221.60	179,117.47
Stockroom (Parts)	102,318.53	84,681.93
Service	122,443.49	122,383.12
Total Gross Profit	$ 598,470.18	$ 585,647.06
ATLANTIC MOTOR SALES, INC.		
New Car Department	$ 231,632.17	$ 310,407.59
Used Car Department	97,936.06	98,347.37
Stockroom (Parts)	18,592.85	22,980.82
Service	23,861.43	37,898.14
Total Gross Profit	$ 176,150.39	$ 272,939.18

15. During 1950, Plaintiff's gross sales were $6,157,631.03, and in 1951 the gross sales were $7,601,985.35.

16. During the period here involved, the Plaintiff and its wholly owned subsidiary, Atlantic Motor Sales, Inc. sold new and used cars and trucks as follows:

MASSEY MOTORS, INC.	1950	1951
New Dodge	778	682
New Plymouth	424	428
New Dodge Trucks	373	590
Used Units	1510	1479
Totals	3085	3179

ATLANTIC MOTOR SALES, INC.	1950	1951
New Dodge	280	306
New Plymouth	126	179
New Dodge Trucks	160	370
Used Units	548	1144
Totals	1114	1999

17. New cars held by the Plaintiff for retail sales to customers were not driven at all by the Plaintiff with the exception of driving necessary for the servicing and delivery of these cars to customers. The same was true with respect to used cars and trucks sold by the Plaintiff in the regular course of business.

18. Plaintiff's new cars held for sale in the ordinary course of business were not registered in its name. Likewise, used cars were not registered in the Petitioner's name. Used cars were generally titled or registered in the name of the pre-

vious owner, who upon trading his car would assign his registration certificate in blank. When Plaintiff sold these units, they were re-registered in the name of the new owner by the office of the Florida Motor Vehicle Commissioner.

19. All cars and trucks obtained by Plaintiff from Chrysler Corporation as a matter of original entry are charged into Account No. 131 on its ledger. When cars or trucks are placed in company use, an entry was made whereby the vehicles were removed from Account No. 131 and placed into the company car account which was designated on Plaintiff's accounting system as Account No. 167. Account No. 167 was a fixed asset account.

20. The Plaintiff depreciated its company cars on the straight line method, utilizing an estimated useful life of 36 months, which the Court finds to be a reasonable and fair rate.

21. During 1950, the Plaintiff had 57 company cars in service, of which 23 were leased to Atlantic Discount Company, Inc. (Exhibit 3). During 1950, the Plaintiff sold 31 company cars, 19 of which were held less than six months prior to date of sale and 12 of which were held for more than six months.

22. During 1951, the Plaintiff had 61 company cars in service, of which 26 were leased to Atlantic Discount Company, Inc. (Exhibit 4). Plaintiff sold 28 company cars in 1951, 14 of which were held less than six months prior to the date of sale and 14 were held more than six months.

23. The decision to place cars in company use was made by decision of Plaintiff's top management. As a car was placed

in company use, it was covered with fire, theft, comprehensive, public liability and property damage insurance for the exclusive benefit of the Plaintiff. Regular license plates were procured for each such car in the Plaintiff's name and the automobile was paid for in full in cash. Dealer tags were never used on any cars used for the company business.

24. The record discloses that the company cars in issue wer used by the various officials of the Plaintiff and its wholly owned subsidiary, Atlantic Motor Sales, Inc., in the general course of everyday business which included among other things traveling to and from the various locations maintained by both corporations. The cars were also used in making bank deposits, messenger service, trips to the postoffice, and for loan to customers needing transportation. The cars were also used to permit managers and other company personnel to travel for business purposes to cities such as Atlantic, Georgia; and Tampa, Florida, for new car showings and other types of factory meetings. The cars were also used by the Plaintiff in its contact with its associate dealers, and for use in various civic functions, such as, parades, etc. Plaintiff's business could not have been operated without the use of company cars.

The decision to sell the company cars was made by Plaintiff's management on the economic facts of whether holding a car longer would appreciably reduce the sales price for it. The Plaintiff followed the practice of disposing of all company and leased cars either immediately before or as soon after a model change as was practicable. Plaintiff's management deemed it advisable to have company personnel in current model company cars. Plaintiff also disposed of leased vehicles during the year if a particular unit had been run approximately 40,000 miles. Company cars were also removed

from service when they had been run approximately 10,000 miles without regard to model change.

All of the cars in issue upon which long-term capital gains treatment was claimed were held for more than six months, and some were held more than one year.

25. During the period involved, the Plaintiff leased a number of cars to a corporation known as Atlantic Discount Company, Inc. at a net rental of 3c per mile, payable monthly. Atlantic Discount Company, Inc. was in the automobile finance business and the leased cars were used by its company personnel in the operation of this business. In 1950, 26 cars were leased, and in 1951, 23 cars were leased. The Plaintiff received rental income in the respective amounts of $5,433.55 and $7,288.22 during 1950 and 1951 from Atlantic Discount Company under the lease arrangement.

26. Atlantic Discount Company, Inc. paid all costs of operating and maintaining the leased vehicles including the cost of all necessary collision and public liability insurance.

27. During 1950 and 1951, Plaintiff incurred expenses of maintaining and operating its company cars of approximately $5,000 to $6,000 annually.

28. In his opening statement, counsel for the Plaintiff abandoned any issue with respect to the depreciation and capital gain on the sale of five cars shown on Exhibit 3 as used by Mrs. W. W. Massey, the wife of Plaintiff's president, or Bob Massey, his son, for 1950, and six such cars shown by Exhibit 4 for 1951.

29. In its return for the calendar year 1950, Plaintiff deducted $9,346.69 as depreciation on all of its company cars,

including those leased to Atlantic Discount Company, Inc. During the calendar year 1950, Plaintiff sold 31 of its company and leased cars, of which 19 were held less than six months. Plaintiff reported a short-term capital gain in the amount of $10,247.00 with respect thereto. The remaining 12 cars were held more than six months, and Plaintiff reported a long-term capital gain in the amount of $6,713.21 with respect thereto. In its return for the calendar year 1951, Plaintiff deducted $11,572.45 as depreciation on its company cars, including those leased to Atlantic Discount Company, Inc. During the calendar year 1951, Plaintiff sold 28 of its company and leased cars, of which 14 were held less than six months. Plaintiff reported a short-term capital gain in the amount of $6,760.41 with respect thereto. The remaining 14 cars sold were held more than six months, and Plaintiff reported a long-term capital gain in the amount of $6,925.97 with respect thereto.* All of these cars, with the exception of those mentioned in paragraph 28 above, were used in Plaintiff's trade or business, were not properly includable in Plaintiff's inventory, and were not held primarily for sale in the ordinary course of its trade or business.

30. During the years 1950 and 1951, the Plaintiff had a standard financing agreement with Atlantic Discount Company, Inc., whereby Massey Motors would sign a contract for the sale of a car for a customer desiring to finance a portion of the purchase price in which contract the finance charges were added and insurance costs. The Plaintiff would then assign or discount this contract to Atlantic Discount Company, Inc. The finance company would then remit to the

---

* In 1951, Plaintiff sold two of its company cars, upon which it reported a long-term capital gain in the aggregate amount of $2,240.31, which was not contested by the Commissioner thereby leaving 12 cars involved in this case for said year.

Plaintiff its check for the cash price for the automobile as specified in the contract, exclusive of finance and insurance charges. The finance company would set up a reserve from the finance and insurance charges, which was not payable to the Plaintiff until such time as each contract was paid in full by the purchase of the car involved.

31. Under the financing arrangement which Plaintiff had with Atlantic Discount Company during 1951, the finance company held back from the Plaintiff as a dealer reserve 5% of all retail contracts then outstanding.

32. The Plaintiff was also under what is known as a recourse arrangement with Atlantic Discount Company, Inc. as a part of its financing agreement whereby Plaintiff agreed to repurchase any car in the event of its repossession by the finance company for an amount equal to the unpaid balance due from the former owner or purchaser of the car. On the books of the finance company, the so-called holdbacks were shown as an account payable due Plaintiff, and on Plaintiff's books, it was carried as an account receivable from the finance company.

33. Plaintiff kept its books and records and files its corporate income tax returns for the period involved on the accrual basis.

34. Under the financing arrangement, Atlantic Discount Company would account to the Plaintiff at the end of each January, July and October for any portion of the so-called finance holdback which might be due Plaintiff. That is to say if in 1951, the holdback were in excess of 5% of the then total outstanding retail contracts purchased from plaintiff at the accounting date, the excess would be paid to Plaintiff and

the balance remaining in the reserve account would not be payable until each retail contract were paid in full.

35. Under the financing arrangement, Atlantic Discount Company, Inc. had the right to charge any losses on repossessions for which it was not otherwise reimbursed against the moneys held back or so-called dealer reserve.

36. The Plaintiff in filing its tax return for 1951 accrued and carried into ordinary income all of the so-called finance reserve holdback being held by Atlantic Discount Company as of December 31, 1951, in the amount of $72,584.95, except the sum of $2,177.54 which had been excluded and charged to an account No. 253-A entitled "reserve for repossessions".

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and subject matter of this action. Title 28, U.S.C., Section 1340; Title 26, U.S.C., Section 3772.

2. The company cars involved in this proceeding, except those assigned to Mrs. W. W. Massey and Bob Massey, as shown by Exhibits 3 and 4, were bona fidely used in the operation of Plaintiff's trade or business, were not properly includable in Plaintiff's inventory, and were not held primarily for sale in the ordinary course of its trade or business under the provisions of Section 117(j) of the 1939 Code. See *United States v. Bennett* 186F. 2d 407 (5th Cir. 1951; *Latimer-Looney Chevrolet Company, Inc. v. Commissioner*, 19 T.C. 120 (1952); *Arthur L. Fields v. Granquist*, 134F. Supp. 624 (D.C. Ore. (1955); *W. R. Stephens Co. v. Kelm*, 140F. Supp. 12 (D. C. Minn. 1956).

3. The Plaintiff is entitled to the depreciation claim on its company cars, with the exception of the cars mentioned in paragraph 2 above, in its 1950 and 1951 returns under Section 23(1) of the 1939 Code.

4. All of the cars which were leased by Plaintiff to Atlantic Discount Company, Inc. during the period involved constituted property used in Plaintiff's trade or business, were not properly includable in Plaintiff's inventory, and were not held primarily for sale in the ordinary course of its trade or business under the meaning of Section 117(j) of the Internal Revenue Code of 1939. See *Philber Equipment Corporation v. Commissioner*, 237F. 2d 129 (3rd Cir. 1956).

5. The Plaintiff is entitled to long-term capital gains treatment on the profits realized by it from the disposition of those company and leased cars in issue for 1950 and 1951 which had been held for more than six months at the date of sale under Sections 117(a) and 117(j) of the 1939 Code.

6. Plaintiff is entitled to exclude the amount of $2,177.54 from its taxable income for the year ended December 31, 1951, in connection with the dealer reserves withheld by Atlantic Discount Company. See *Blaine-Johnson v. Commissioner* 233 F. 2d 952 (4th Cir. 1956) and *Keasbey & Mattison Co. v. United States*, 141 F. 2d 163 (3rd Cir. 1944). It appears from the record that the Plaintiff could have excluded $72,584.00 from its taxable income at the end of 1951 under the authority of the *Blaine-Johnson* and *Keasbey & Mattison* cases, but its failure to do so does not prevent the Plaintiff from excluding the lesser sum of $2,177.54 as it did in filing its 1951 return.

7. The parties are directed to settle decree accordingly,

the Court having been advised at the hearing that counsel had agreed to compute the amount of refund to which the Plaintiff might be entitled and to submit same to the Court together with a proper form of judgment to be entered in this cause.

BRYAN SIMPSON
United States District Judge

Jacksonville, Florida,

October 7, 1957

William R. Frazier, Esq.,
Attorney for Plaintiff

U. S. Attorney
Attorney for Defendant

Civil Action No. 3346-Civ.-J

FILED JACKSONVILLE, FLA., OCTOBER 31, 1957

JULIAN A. BLAKE, Clerk

STIPULATION

Comes now the parties by their respective counsel and request the Court to amend the Findings of Fact and Conclusions of Law entered October 7, 1957, in the particulars set forth below. The parties hereby agree that the said amendments are in accordance with the evidence presented at the trial of this action:

I

Paragraph 19 of the Findings of Fact should be amended to

read as follows:

"19. All cars and trucks obtained by plaintiff from Chrysler Corporation as a matter of original entry are charged into Account No. 131 on its ledger. When cars or trucks were placed in company use, an entry was made whereby the vehicles were removed from Account No. 131 and placed into the company car account which was designated on Plaintiff's accounting system as Account No. 167. Account No. 131 is the inventory account. Account No. 167 is a fixed asset account."

II

Paragraph 21 of the Findings of Fact should be amended to read as follows:

"21. During 1950, the Plaintiff had 51 company cars in service, of which 23 were leased to Atlantic Discount Company, Inc. (Exhibit 3). During 1950, the plaintiff sold 27 of the 51 cars, 16 of which were held less than six months prior to date of sale and 11 of which were held for more than six months."

III

Paragraph 22 of the Findings of Fact should be amended to read as follows:

"22. During 1951, the Plaintiff had 53 cars in company service, of which 26 were leased to Atlantic Discount Company, Inc. (Exhibit 4). Plaintiff sold 23 of these cars during 1951. (Capital gain has been allowed by the Commissioner of Internal Revenue as

to two of these and are not here in issue.) Of the remaining 21 cars, 9 were held for less than six months prior to the date of sale and 12 were held more than six months."

IV

Paragraph 27 of the Findings of Fact should be amended to read as follows:

"27. During 1950 and 1951, Plaintiff incurred expenses of maintenance and operation of its company cars of approximately $5,000 to $6,000 annually. The said expenses were claimed by the Plaintiff on its federal income tax returns as ordinary and necessary business expense deductions and the said deductions were allowed by the Commissioner of Internal Revenue."

V

Paragraph 28 of the Findings of Fact should be amended to read as follows:

"28. In his opening statement, counsel for the Plaintiff abandoned any issue with respect to the depreciation and capital gain on the sale of a total of 10 cars shown on Exhibits 3 and 4 to have been used by Mrs. W. W. Massey, the wife of Plaintiff's president, and Bob Massey, his son, during the years 1950 and 1951. The Court finds that the vehicle listed in Exhibit 3 as Item 18 was likewise used by Mrs. Massey, and that therefore no depreciation is allowable with respect thereto."

Paragraph 29 of the Findings of Fact should be amended to read as follows:

"29. In its return for the calendar year 1950, Plaintiff deducted $9,346.69 as depreciation on all of its company cars, including those leased to Atlantic Discount Company, Inc. During the calendar year 1950, Plaintiff sold 27 of the 51 company cars in use and under lease, of which 16 were held less than six months prior to the date of sale. Plaintiff reported a short-term capital gain in the amount of $10,247.00 with respect thereto. The remaining 11 cars were held more than six months, and Plaintiff reported a long-term capital gain in the amount of $6,713.21 with respect thereto. In its return for the calendar year 1951, Plaintiff deducted $11,572.45 as depreciation on its company cars, including those leased to Atlantic Discount Company, Inc. During the calendar 1951, Plaintiff sold 23 of the 53 cars in company use and under lease, of which 9 were held less than six months. Plaintiff reported a short-term capital gain in the amount of $6,760.41 with respect thereto. Of the remaining 14 cars depreciation and long term-capital gain treatment has been allowed by the Commissioner of Internal Revenue as to 2 and they were not in issue. The remaining 12 cars sold were held more than six months prior to the date of sale, and Plaintiff reported a long-term capital gain in the amount of $6,925.97 with respect thereto. All of these cars, with the exception of those mentioned in Paragraph 28 above, were used in Plaintiff's trade or business, were not properly includable in Plaintiff's inventory, and were not held primarily

for sale in the ordinary course of its trade or business."

WILLIAM R. FRAZIER
Counsel for Plaintiff

JAMES L. GUILMARTIN
UNITED STATES ATTORNEY

By: EDITH HOUSE
ASSISTANT UNITED STATES ATTORNEY

No. 3346-Civ-J

FILED JACKSONVILLE, FLA., NOVEMBER 6, 1957

JULIAN A. BLAKE, Clerk

AMENDMENT TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

On stipulation of the parties hereto filed herein October 31, 1957, the Court's Findings of Fact and Conclusions of Law, filed in this cause October 7, 1957, is amended in the following respects:

I

Paragraph 19 of the Findings of Fact is amended to read as follows:

19. All cars and trucks obtained by plaintiff from Chrysler Corporation as a matter of original entry are charged into Account No. 131 on its ledger. When cars or trucks were placed in company use, an entry was

made whereby the vehicles were removed from Account No. 131 and placed into the company car account which was designated on Plaintiff's accounting system as Account No. 167. Account No. 131 is the inventory account. Account No. 167 is a fixed asset account.

II

Paragraph 21 of the Findings of Fact is amended to read as follows:

21. During 1950, the Plaintiff had 51 company cars in service, of which 23 were leased to Atlantic Discount Company, Inc. (Exhibit 3). During 1950, the plaintiff sold 27 of the 51 cars, 16 of which were held less than six months prior to date of sale and 11 of which were held for more than six months.

III

Paragraph 22 of the Findings of Fact is amended to read as follows:

22. During 1951, the Plaintiff had 53 cars in company service, of which 26 were leased to Atlantic Discount Company, Inc. (Exhibit 4). Plaintiff sold 23 of these cars during 1951. (Capital gain has been allowed by the Commissioner of Internal Revenue as to two of these and are not here in issue.) Of the remaining 21 cars, 9 were held for less than six months prior to the date of sale and 12 were held more than six months.

IV

Paragraph 27 of the Findings of Fact is amended to read

as follows:

27. During 1950 and 1951, Plaintiff incurred expenses of maintenance and operating its company cars of approximately $5,000 to $6,000 annually. The said expenses were claimed by the Plaintiff on its federal income tax returns as ordinary and necessary business expense deductions and the said deductions were allowed by the Commissioner of Internal Revenue.

V.

Paragraph 28 of the Findings of Fact is amended to read as follows:

28. In his opening statement, counsel for the Plaintiff abandoned any issue with respect to the depreciation and capital gain on the sale of a total of 10 cars shown on Exhibits 3 and 4 to have been used by Mrs. W. W. Massey, the wife of Plaintiff's president, and Bob Massey, his son, during the years 1950 and 1951. The Court finds that the vehicle listed in Exhibit 3 as Item 18 was likewise used by Mrs. Massey, and that therefore no depreciation is allowable with respect thereto.

VI

Paragraph 29 of the Findings of Fact is amended to read as follows:

29. In its return for the calendar year 1950, Plaintiff deducted $9,346.69 as depreciation on all of its company cars, including those leased to Atlantic Discount Company, Inc. During the calendar year 1950, Plaintiff sold 27 of the 51 company cars in use and under lease, of which 16 were held less than six months

prior to the date of sale. Plaintiff reported a short-term capital gain in the amount of $10,247.00 with respect thereto. The remaining 11 cars were held more than six months, and Plaintiff reported a long-term capital gain in the amount of $6,713-21 with respect thereto. In its return for the calendar year 1951, Plaintiff deducted $11,572.45 as depreciation on its company cars, including those leased to Atlantic Discount Company, Inc. During the calendar year 1951, Plaintiff sold 23 of the 53 cars in company use and under lease, of which 9 were held less than six months. Plaintiff reported a short-term capital gain in the amount of $6,760.41 with respect thereto. Of the remaining 14 cars depreciation and long-term capital gain treatment has been allowed by the Commissioner of Internal Revenue as to 2 and they were not in issue. The remaining 12 cars sold were held more than six months prior to the date of sale, and Plaintiff reported a long-term capital gain in the amount of $6,925.97 with respect thereto. All of these cars, with the exception of those mentioned in Paragraph 28 above, were used in Plaintiff's trade or business, were not properly includable in Plaintiff's inventory, and were not held primarily for sale in the ordinary course of its trade or business.

BRYAN SIMPSON
United States District Judge

Jacksonville, Florida
November 6, 1957

William R. Frazier, Esq.
Attorney for Plaintiff

U. S. Attorney
Attorney for defendant

CIVIL ACTION NO. 3346-Civ.-J.

FILED JACKSONVILLE, FLA., JANUARY 21, 1958

JULIAN A. BLAKE, Clerk

FINAL JUDGMENT

This cause came on to be heard before the Court without a jury on February 20, 1957, at Jacksonville, Florida, and the Court having heretofore made its findings of fact and conclusions of law directing judgment for the plaintiff in the total amount of $6,133.41, in accordance with an agreed computation between the respective parties hereto, being a part of the corporate income tax deficiencies and interest thereon paid by the plaintiff for the taxable years 1950 and 1951, inclusive, as follows:

Year	*Overpayment*
1950	$ 2,732.28
1951	3,401.13
Total	$ 6,133.41

Whereupon, upon consideration thereof, it is

CONSIDERED, ORDERED and ADJUDGED that the plaintiff recover the sum of $6,133.41, together with interest thereon at the rate of 6% per annum from November 5, 1954, to a date preceding the date of the refund check by not more than thirty days and costs in the amount of $17.10.

DONE and ORDERED in Chambers at Jacksonville, Duval

County, Florida, this 21st day of January, A. D. 1958.

BRYAN SIMPSON

United States District Judge

Consented to:
JAMES L. GUILMARTIN
U. S. Attorney
By: EDITH HOUSE
Asst. U. S. Atty.

No. 3346-Civil-J

FILED JACKSONVILLE, FLA., MARCH 18, 1958

JULIAN A. BLAKE, Clerk

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the United States of America, defendant above named, by its undersigned attorneys, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Final Judgment entered in this action on January 21, 1958.

JAMES L. GUILMARTIN
United States Attorney

By E. COLEMAN MADSEN
Assistant United States Attorney

Attorneys for Defendant-Appellant.

I DO CERTIFY that on this date a copy of the foregoing

Notice of Appeal was furnished by mail to William R. Frazier, Esq., attorney for plaintiffs, at his last known mailing address, namely, 816 Atlantic Bank Building, Jacksonville, Florida.

DATED at Jacksonville, March 18, 1958.

E. COLEMAN MADSEN
Assistant United States Attorney

No. 3346-Civ-J

APRIL 24, 1958

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL

On oral motion of the defendant, United States of America, and for good cause shown, it is

ORDERED that the said defandant shall have an extension of fifty days from April 27, 1958 to file the transcript of record on appeal in this cause.

DONE and ORDERED at Ocala, Florida, April 24, 1958.

BRYAN SIMPSON
United States District Judge

Hill & Frazier

U. S. Attorney (Madsen)

No. 3346-Civ-J

FILED JACKSONVILLE, FLA., JUNE 11, 1958

JULIAN A. BLAKE, Clerk

ORDER FOR TRANSMITTAL OF ORIGINAL EXHIBITS TO COURT OF APPEALS

On stipulation of the parties and as provided by Rule 75(i), Federal Rules of Civil Procedure, it is

ORDERED that the plaintiff's exhibits, numbered 1 through 7, inclusive, introduced in evidence in the trial of this cause, be transmitted to the United States Court of Appeals for the Fifth Circuit.

DONE AND ORDERED at Jacksonville, Florida, this 11th day of June, 1958.

BRYAN SIMPSON

UNITED STATES DISTRICT JUDGE

The undersigned move the entry of the foregoing order.

HILL & FRAZIER

By WILLIAM R. FRAZIER

Attorneys for Plaintiff.

JAMES L. GUILMARTIN
United States Attorney

By EDITH HOUSE
Assistant United States Attorney

Attorneys for Defendant.

CIVIL NUMBER 3346-J

FILED JACKSONVILLE, FLA., JUNE 3, 195[illegible]

JULIAN A. BLAKE, Clerk

DEFENDANT-APPELLANT'S DESIGNATION OF RECORD ON APPEAL

Pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, the defendant-appellant herein, United States of America, by its attorney, James L. Guilmartin, United States Attorney in and for the Southern District of Florida, hereby designates the entire record for inclusion in the record on appeal to the United States Court of Appeals for the Fifth Circuit, taken by notice of appeal filed in the above case on the Eighteenth Day of March 1958, including but not limited to the following portions:

1. Complaint
2. Stipulation extending time for defendant to plead
3. Answer
4. Transcript of trial proceedings and plaintiff's exhibits 1-7, inclusive
5. Findings of fact and conclusions of law
6. Stipulation amending findings of fact and conclusions of law.
7. Amendment to findings of fact and conclusions of law

8. Judgment

9. Notice of appeal

10. Motion for extending time for docketing the record on appeal.

11. Order granting extension of time for docketing record on appeal

12. Docket entries

13. This designation

JAMES L. GUILMARTIN
UNITED STATES ATTORNEY

By: EDITH HOUSE, Asst. U. S. Atty.

ATTORNEY FOR DEFENDANT-APPELLANT,
UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA)
) SS:
SOUTHERN DISTRICT OF FLORIDA)

I, JULIAN A. BLAKE, CLERK of the United States District Court in and for the Southern District of Florida, and as such the legal custodian of the records and files of said Court, do hereby certify that the foregoing pages numbered 1 to 123, inclusive, contain a full, true, and correct copy of all such papers and proceedings in the cause of Massey Motors, Inc., Plaintiff, vs. United States of America, Defendant, Case No. 3346-Civil-J., as appear upon the records and files of my office which have been directed to be included in said transcript by the Appellant, United States of America.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Jacksonville, Florida on this the 11th day of June, A. D., 1958.

JULIAN A. BLAKE, CLERK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

BY: ROBERT H. COOKE

Deputy Clerk

(SEAL)

[fol. 132]

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—January 14, 1959 (omitted in printing).

[fol. 133]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17279

UNITED STATES OF AMERICA, Appellant,

versus

MASSEY MOTORS, INC., Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before Rives, Tuttle and Cameron, Circuit Judges.

OPINION—February 26, 1959

Tuttle, Circuit Judge: The United States in this appeal attacks the judgment of the trial court permitting the appellee taxpayer to take straight line depreciation figured on the entire useful life on certain company-used automobiles sold by the automobile dealer taxpayer after relatively short use by it generally for more than the original cost to the taxpayer.

[fol. 134] Appellee is a franchised Chrysler dealer in Jacksonville, Florida. This case differs from *Duval Motor Company* v. *Commissioner of Internal Revenue*, 5 Cir., ... F. 2d ....., decided today in that on this appeal it is conceded by the government, following a finding to such effect by the trial court, that the automobiles here in issue were property used in the trade or business of the taxpayer.[1]

[1] No salesmen's automobiles were involved in this case, and there was no evidence that any of these cars were used substantially for

Massey Motors, Inc., a franchised Chrysler dealer, withdrew from the new cars bought by it during the calendar (and tax) years 1950 and 1951, 51 and 53 automobiles respectively. Of these it assigned approximately one half to its executives and other employees for transportation in connection with the company's business. The other half it rented to an unaffiliated finance company at a net rental of 3 cents a mile. From this rental operation it made a substantial net profit. The executives' cars were uniformly sold at the end of 8,000 to 10,000 miles use or the advent of new models, whichever was earlier. The rental cars were sold at the advent of new models or upon 40,000 miles of use. In nearly every instance the company used cars were sold at a substantial profit above the cost, and on the [fol. 135] average the rented cars were likewise sold at a profit.[2] The taxpayer figured depreciation on all of the cars on the straight-line basis with no allowance for salvage value. Gains on the sales were computed at capital gains rates with a basis of cost less depreciation.

The Commissioner disallowed the capital gains treatment of the gains and also disallowed the depreciation, contending that the automobiles were not property used in the trade or business under Section 117(j) of the Internal Revenue Code of 1939, because they were held primarily for sale to customers in the ordinary course of taxpayer's trade or business. The taxpayer paid the resulting deficiency and thereafter filed its claims for refund for the two years. The claims asserted that "the taxpayer contends that it is

---

any purpose different than if they had been automobiles of a different make from those taxpayer was franchised to sell. On the undisputed facts of this record it seems to us that a respectable case might be made for the proposition that as a matter of law these automobiles sold within the same model year as when bought, and sold generally at a profit above original cost without allowance for depreciation, were held primarily for sale to customers in the ordinary course of taxpayer's business. Since the government does not urge this position, however, and since it is not argued here, we shall not deal further with it.

[2] The executives' cars here in issue were sold for $11,272.80 more than their cost and the rental cars were sold for $525.84 more than they cost.

entitled to a reasonable allowance for depreciation as claimed on the aforementioned automobiles, constituting property used in the trade or business . . . and that the gain realized by it on the sale of said automobiles is reportable as long term capital gain pursuant to the provisions, etc."[3] Upon the disallowance of the claim the suit for refund was filed in the District Court.

The record discloses that the only evidence introduced below related to the business methods of the taxpayer [fol. 136] touching on the use of company and rental cars and their subsequent sale, the essential parts of which are stated above, and testimony as to a small "reserve for repossessions," later discussed. No evidence was introduced on the depreciation issue apart from that relating to company practices. The trial court held in favor of the taxpayer on the capital gains treatment on the sale of the cars and also made a finding that the rate of depreciation, utilizing a 36-months estimated useful life without deducting any salvage value, was a reasonable and fair rate.

The government here attacks this finding and the court's conclusion that the claimed depreciation should be allowed. The thrust of its position is that depreciation must be figured with relation to the known useful life of the asset in the hands of the taxpayer rather than the entire useful life of the property itself; that depreciation cannot be figured without considering the salvage value at the end of the useful life in the hands of the taxpayer; that it was demonstrated here that the useful life in the hands of Massey Motors, Inc. was less than a year; and that the salvage value more than equaled original cost; thus the depreciation would be zero.

Taxpayer, to the contrary, asserts that whatever may have once been the meaning of useful life "and whatever meaning it may have under current Treasury Regulations promulgated following enactment of the 1954 Code, at the time here in question 'useful life' meant the whole useful

[3] This claim, which was of course made the basis of the subsequent suit, demonstrates the fallacy of appellee's contention here that the issue of depreciation was not separately raised in the trial court. Taxpayer put this matter in issue. Where the Commissioner makes a determination disallowing depreciation, the burden is on the taxpayer to prove the correctness of the depreciation claimed.

life of the property itself without regard to the length of time it was intended by the taxpayer that it would be used [fol. 137] by him; that the salvage value should properly be that value at the end of the life of the automobiles after they had served their total useful life in the hands of all owners; that total useful life of these automobiles was three years, and that no salvage value would remain thereafter." This is in effect what the trial court held. In light of the facts here that these cars, other than the rented cars, were used approximately 8,000 to 10,000 miles during the first year, and even in the case of the rented cars that they still had a value equaling their cost at the end of the first of the three years, such a holding is so contrary to our knowledge of the facts of life that it must bear close scrutiny.

The statute provides simply that the taxpayer may take as a deduction under the heading of "Depreciation," "a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence) (1) of property used in the trade or business."

There is no real dispute between the parties here as to the meaning of the statutory terms. Conceptually depreciation is properly a deductible item because the natural wear and tear upon the capital items which a taxpayer uses to produce his income is a cost element in the production of income. The Supreme Court said in 1926:

> "The amount of the allowance for depreciation is the sum which should be set aside for the taxable year, in order that at the end of the useful life of the plant *in the business* the aggregate of the sums set aside will [fol. 138] *(with the salvage value)* suffice to provide an amount equal to original cost." (Emphasis added.) *United States* v. *Ludey*, 274 U.S. 295, 300, 301.

We think it clear that the words "of the plant" in this opinion refer to all depreciable assets alike, not only the fixed assets. Appellee here agrees in its brief that a salvage value must be determined before the application of straight line depreciation over a three year life.[4] It is unfortunate

[4] In its brief appellee states: "We readily recognize the fact that the cost of a business asset depreciated on the straight line method

that appellee did not "recognize" this principle when it submitted the case to the trial court rather than insist it was entitled to straight three years' depreciation, which it improperly deducted, contrary to all recognized accounting and legal principles, and thus induced so apparent an error in the judgment of the trial court.[5] Taxpayer's brief concedes that if this question is properly before the court, as we have found it is, the case must be remanded to the trial court to permit it to prove the salvage value—an essential part of its case which it failed to prove on the first trial. It might be simpler for us to reverse the erroneous judgment thus induced by taxpayer and enter judgment dismissing this part of the appellee's suit for failure of proof. [fol. 139] However, since we do not feel that substantial justice would be achieved without allowing an opportunity for taxpayer to furnish the proof necessary under the principles of law properly applicable to the case, we shall not give it that direction.

The principal difficulty in figuring depreciation on property of the kind here used is that it is quite doubtful that Congress ever intended that automobiles temporarily used by people in the business of selling automobiles should be subject to depreciation at all. See *Duval Motor Company v. Commissioner of Internal Revenue, supra.* As illustrated by the facts in this record, depreciation of $347.93 on a company car, bought for $2086.43, for a holding period of six and a half months, followed by a sale on a capital gains basis of $2695.00 offends all ideas of the real purpose of

---

should first be reduced by the estimated salvage value before applying the rate of depreciation in accordance with the decision of the Supreme Court in United States v. Ludley, 274 U.S. 295."

[5] Having filed its claim for refund on its assertion that "it is entitled to a reasonable allowance for depreciation *as claimed* on the aforementioned automobiles" (emphasis added) the taxpayer squarely assumed the burden of proving the reasonableness of the now concededly erroneous schedule. As pointed out above, there is no merit in taxpayer's contention that the court's finding in favor of this erroneous schedule is not properly before us for consideration.

allowing depreciation.[6] Recognizing full well that tax effects on businesses are not always uniform and, more important, that the incidence of federal taxation is statutory and not always strictly equitable, or always logical, we think it quite appropriate to consider the apparently unintended result that follows from an asserted construction of the tax laws in performing our duty to construe the language of a statute.

The Tax Court, with the acquiescence of the Commissioner, in *Latimer-Looney Chevrolet Co., Inc.* v. *Commis-*
[fol. 140] *sioner, supra*, and the trial court in this case having held, without appeal on the part of the government, that cars such as these here in issue are property used in the trade or business and are thus subject to depreciation, it now becomes necessary for us to apply the statute on depreciation with such light as can be gleaned from the Treasury Regulations and the Tax Court and trial and appellate court decisions.

Taxpayer urges that the construction it advances is consistent with that promulgated by the Commissioner himself, since in Regulations in effect during the tax years in question it is stated:

> "The capital sums to be recovered shall be charged off over the useful life of the property, either in equal annual installments, or in accordance with any other recognized trade practice, such as an apportionment of the capital sum over units of production." Treasury Reg. 702, Sec. 29.23 (l-5) 1939 Code.

Taxpayer contrasts this with the language in corresponding regulations in existence prior to 1942, the date of the promulgation of the above quoted language. In point of fact, there is no change in the language in the corresponding sections which deal with "Method of computing de-

---

[6] As we roughly compute the tax savings, *solely because of the use of depreciation on these company cars* where they are accorded capital gains treatment on sale, the automobile mentioned above, instead of yielding Massey Motors a return after taxes, of $250.38 on the suggested Chrysler mark-up of 25%, the automobile, after seven months' use by the company, would yield a return, after taxes, of $550.34.

preciation." Both before and after 1942 the relevant language of this section of the Regulations was the same. See Section 27.23 (1-5) for 1939 and as amended on Dec. 8, 1942. The change in language in regulations under the depreciation section of the 1939 Code appears in Section 29.23 (1-1). Prior to Dec. 8, 1942, this section, which in [fol. 141] reality appears to be a definition section rather than a regulation telling how to compute depreciation, provided in essential part:

> "A reasonable allowance for the exhaustion, wear and tear, and obsolescence of property used in the trade or business may be deducted from gross income. For convenience such an allowance will usually be referred to as depreciation . . . . The proper allowance for such depreciation of any property used in the trade or business is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not necessarily at a uniform rate), whereby the aggregate of the amounts so set aside, plus the salvage value, will, at the end of the *useful life of the property in the business*, equal the cost or other basis of the property . . . ." (Emphasis added.)

Taxpayer here seems to concede, as we think it must, that if this regulation had been in effect during the tax years here in issue, the useful life of the automobiles would be the life in the hands of the taxpayer. In fact we think the quoted language from *United States* v. *Ludey, supra*, is determinative of the matter. It clearly says the test is *the end of the useful life of the plant in the business.*

Taxpayer points to a change in the amended regulations promulgated in 1942, as indicating change in the Commissioner's interpretation of the statute in this respect. [fol. 142] The corresponding language of the 1942 amended regulation is as follows:

> "A reasonable allowance for the exhaustion, wear and tear, and obsolescence of property used in the trade or business, *or treated under* [Reg.] *section 19.23 (a)-15 as held by the taxpayer for the production of income* may be deducted from gross income. For con-

venience such an allowance will usually be referred to as depreciation . . . . The proper allowance for such depreciation is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not necessarily at a uniform rate), whereby the aggregate of the amounts so set aside, plus the salvage value, will, at the end of the useful life of the *depreciable property*, equal the cost or other basis of the property . . . ."

It will be apparent that in the last sentence the words "property in the business" has been eliminated and the words "depreciable property" substituted. A cursory look at the legislative history back of this amendment clearly demonstrates that there was no purpose to express a change in what was meant by useful life. This change was necessitated by an amendment in 1942 to the 1939 Code, which *added* as property entitled to depreciation "property held for the production of income." Thus the regulation which had theretofore dealt only with property used in the trade or business was inadequate, and it had to be amended by the inclusion of the italicized words above. The last sentence could not, of course, thereafter adequately cover both [fol. 143] classes of property by referring to "property in the business" because this would not include the new class "property held for the production of income." The language "depreciable property" would, of course, cover both, and it was substituted for "property in the business."

Thus, we think it clear that whatever was understood by the Treasury Department prior to 1942 by useful life remained unchanged by the amendments here discussed. Thereafter, when the 1954 Internal Revenue Code was adopted, without any change in the depreciation section of the law, the Treasury promulgated the Regulations under it. They expressly provide:

> "Salvage value is the amount (determined at the time of acquisition) which is estimated will be realizable upon sale or other disposition of an asset *when it is no longer useful in taxpayer's trade or business* or in the production of his income *and is to be retired by the taxpayer.*" (Emphasis added.)

It must be borne in mind that there has been no change in the basic statute in any matter here relevant during the entire period of time. We should thus be inclined to look with considerable disfavor on any contention that a slight change in Regulations worked such a double shift in the effect of a simple statute allowing reasonable depreciation. We do not think the Commissioner's Regulations could change the basic concept of depreciation from that announced by the Supreme Court in the Ludey case.

[fol. 144] We are supported in our conclusion that there has been no intent by the Commissioner to effect such a change by the further significant fact that prior to and after the 1942 change in Regulations, there was outstanding the Treasury's Bulletin F, universally recognized by all and sundry familiar with tax problems as representing the Treasury's theories as to the application of depreciation.[1]

This Bulletin includes the following language under the heading "Allowance for Depreciation and Obsolescence":

> "The proper allowance for exhaustion, wear and tear, including obsolescence, of property used in the trade or business is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not necessarily at a uniform rate) whereby the aggregate of the amounts so set aside, plus the salvage value, will at the end of the useful life of the property *in the business*, equal the cost or other basis of the property." (Emphasis added.)

It will thus be seen that notwithstanding the change in Regulation Section 29.23 1-1 in December, 1942, no change has been made in Bulletin F which purports to show the

---

[1] Of course, in its initial publication, the Internal Revenue Service was careful to disclaim any authoritative standing for the specific items treated within Bulletin F. Nevertheless, when it was republished in January, 1942, it stated:

> "It contains information and statistical data relating to the determination of deductions for depreciation and obsolescence, from which taxpayer and their counsel may obtain the *best available indication of Bureau practice* and the trend and tendency of *official opinion* in the administration of pertinent provisions of prior Revenue Acts."

[fol. 145] "tendency of official opinion" in the Internal Revenue Service. It cannot well be said that the change above discussed was intended to, or did, change the meaning of useful life.

We conclude that as to a taxpayer so placed that his business experience has taught that automobiles, bought by him for sale but temporarily assigned for use in the business with use in the business averaging less than one third of their total usable life,[8] such automobiles are depreciable by him on the basis of his expected use of the cars in his business and not on the basis of the length of time the car is expected to be usable as a passenger automobile.[9]

The statute allows a reasonable amount for depreciation. No regulation, although valid and binding to the extent it does not enlarge or conflict with the statute, can bind the Commissioner to the allowance of anything more than a reasonable deduction for a whole class of taxpayers. A construction of this regulation as contended for by this taxpayer would result in not only a grossly unreasonable deduction for depreciation, but would offend the basic concept of depreciation and its purpose. We, therefore, cannot [fol. 146] approve a construction of the regulation that would reach this result, or if we did so, we would have to hold it invalid as to the factual situation here present as not being authorized by the statute.

---

[8] We have not here commented on the short life of three years here accepted by the trial court. Bulletin F, above referred to, suggests a life of business automobiles, upon the assumption that their entire life is to be a business one rather than for individual or family use, of five years for all except salesmen. It would seem quite unlikely that a useful life of three years for a passenger automobile used only 8,000 to 10,000 miles the first year would be sustainable even on the taxpayer's theory of the law upon a full development of the case. In any event the correct rate of depreciation is dependent upon proof. None was offered by the taxpayer to justify its taking this unrealistically short life without even providing for any salvage value.

[9] For a clear and convincing discussion and analysis of this problem, leading the author to the same conclusion we have reached see Montgomery's Federal Taxes, 37th Edition, Chapter 6, page 4, et seq.

As we have previously stated, the basic difficulty here arises from the application of depreciation to a type of property held in such circumstances as would raise much doubt that they were considered as depreciable assets when the law was enacted. So long as taxpayers normally used their capital and other business property for the period of time that they had any substantial vitality left in them the regulations, construed either way, were satisfactory. But when, as here the courts, over the commissioner's opposition, gave Section 117(j) treatment including the right to depreciation, to property used as were these automobiles, it cannot, we think, be said that the Commissioner is bound to his construction of the regulations published under different circumstances, and especially when he consistently took the position that the depreciation regulations did not apply here at all. When he lost that argument he then issued new regulations which do precisely cover this type of property as used here. In doing so he did not intend to and did not—he *could* not—change the law. For us to hold that the new regulations of 1956 had the effect of defining useful life as useful life in the business for the first time would amount to our saying that the Commissioner could by Regulations change the law.

We realize that this conclusion brings us to a different result from that reached by the Court of Appeals for the [fol. 147] Ninth Circuit in *Evans* v. *Commissioner of Internal Revenue*, 9 Cir., ... F. 2d ....., dec. Jan. 26, 1959, which has been brought to our attention after argument. With deference, we think that decision, reached after a well-reasoned and painstaking analysis, too greatly emphasizes the Regulations as portraying the Commissioner's position. In effect it says that there is no shifting back and forth by the Commissioner on this construction; but that he has always construed useful life as the total life of usefulness and that he is bound by this consistent practice. There is much to be said for the proposition that taxpayers have a right to rely on the clearly announced construction placed on the laws by the administrative officials whose duty it is to write the regulations and apply them administratively. This is well stated by the excellent opinion in the Adams case. But we feel that that court has overlooked the essential

point that all the time these regulations were in effect the Commissioner was making known by litigating everywhere his position that these regulations were not applicable here, no matter how they were construed because he was contending that these were not depreciable assets at all. Under these circumstances, it could not be said that a taxpayer, so circumstanced as Massey Motors, Inc., could rely on the Treasury's position as saying that he could use the combination of capital gains treatment with depreciation deductions to double its profits after taxes on the sale of such assets. So long as the Commissioner was proclaiming at every opportunity that the depreciation regulation did not apply to this situation at all, it cannot be said that he is bound by language which took on no real significance until [fol. 148] the courts held against him on his contention. Thereafter he is free, it seems to us, to argue a construction of the regulations that carries out the intent of the statute rather than being bound by one which frustrates it.

The government contends that as a necessary corollary to our conclusion we should find that on the record here the salvage value at the end of this useful life, approximating one year, exceeds cost, and that no depreciation can be taken at all. We think that the attention of the trial court and both parties was so concentrated on the legal principle that too little attention was paid to the fact issue: what would be a reasonable allowance for depreciation under the principles of law here laid down? Without argument touching the point we should not decide for instance whether salvage value should be the value of the company cars at retail, since that is how they are sold, or whether, since much of the value of the cars in the hands of this taxpayer results from the fact that it is a large buyer and seller of automobiles, the salvage value should be on the wholesale market, since that is the market on which it buys them. We think these matters must be developed on a new trial, which can be limited to such issues as are here discussed without retrying the other issue on which the government does not appeal.

As to the remaining point in the case, the right of the taxpayer to deduct from income for 1951 a small reserve called "Reserve for Repossessions," the parties agree that

the same issue has recently been decided by this Court against the government in *Texas Trailercoach, Inc.* v. *Com-*
[fol. 149] *missioner*, 5 Cir., 251 F. 2d 395, and also by other Courts of Appeals in *Johnson* v. *Commissioner*, 4 Cir., 233 F. 2d 952, *Glover* v. *Commissioner*, 8 Cir., 253 F. 2d 735, *Hansen* v. *Commissioner*, 9 Cir., ... F. 2d ..... We think we are bound by those decisions and therefore affirm the action of the trial court touching on this issue. Of course, no final judgment will be entered in the trial court immediately, and in the event the Supreme Court on certiorari already filed decides contrary to our views, the trial court can and should give effect to its decision.

Judgment Reversed for further proceedings not inconsistent with this opinion.

CAMERON, Circuit Judge: I dissent.

[fol. 150]

IN UNITED STATES COURT OF APPEALS

No. 17279

UNITED STATES OF AMERICA,

versus

MASSEY MOTORS, INC.

JUDGMENT—February 26, 1959

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed for further proceedings not inconsistent with the opinion of this Court.

"Cameron, Circuit Judge, dissenting."

[fol. 151] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 153]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1958

MASSEY MOTORS, INC., Petitioner,

vs.

UNITED STATES OF AMERICA.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—May 22, 1959

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

July 13, 1959.

Hugo L. Black, Associate Justice of the Supreme Court of the United States.

Dated this 22 day of May, 1959.

[fol. 155]

SUPREME COURT OF THE UNITED STATES

No. 141, October Term, 1959

[Title omitted]

ORDER ALLOWING CERTIORARI—October 12, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is transferred to the summary calendar and set for argument immediately following No. 283.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Vehicles 1949 and 1950
Year ended 12-31-50

Description	Serial Number	Date Purchased	Cost	Sale Price		Depreciation 1948	1949	1950	Total	Inventory Added to	Removed from	Returned to
Dodge Route Van	84202046	11-19-48	253824	165000	1	—	84624	21150	105774	11-19-48	6-14-49	3-30-50
Dodge Coronet, Conv. Cpe.	31363525	8-30-49	195802	201982	2	—	16348	5438	21786	8-30-49	9-17-49	1-2[illegible]
Dodge Coronet 4-Door	31364914	8-31-49	174109	209500	3	—	14521	4836	19357	8-31-49	9-21-49	1-4-50
Dodge Coronet Tn. Sedan	31398360	10-12-49	185094	209500	4	—	10300	5141	15441	10-12-49	10-31-49	1-[illegible]-50
Dodge Coronet, Clb. Cpe.	31402591	10-19-49	173893	199500	5	—	9673	4830	14503	10-19-49	10-31-49	1-2-50
Dodge Coronet Clb. Cpe.	31414530	11-1-49	173046	197700	6	—	4836	4806	9642	11-1-49	11-8-49	[illegible]
Dodge Coronet Clb. Cpe.	31414815	11-1-49	173047	209500	7	—	—	19255	19255	11-1-49	12-21-49	[illegible]
Dodge Coronet Clb. Cpe.	31424157	12-21-49	186074	249500	8	—		10362	10362	12-21-49	1-4-50	[illegible]-50
Dodge Coronet Conv. Cpe.	31440608	1-3-50	202682	282930	9	—		28152	28152	1-3-50	1-21-50	6-29-50
Dodge Coronet Clb. Cpe.	31473665	6-5-50	170484	269500	10	—		18964	18964	6-5-50	6-13-50	10-7-50
Ply. Spec. Dlx. Clb. Cpe.	12456665	6-17-50	145022	210000	11	—		4030	4030	6-17-50	6-29-50	7-21-50
Dodge Coronet Clb. Cpe.	31469939	6-12-50	189400	187750	12	—		21048	21048	6-12-50	6-12-50	[illegible]
Ply. Spec.-Dlx. Clb. Cpe.	12442564	6-15-50	147510	147510	13	—		—	—	6-15-50	6-15-50	[illegible]-50
Ply. Spec.-Dlx. Clb. Cpe.	12447388	6-7-50	147510	150000	14	—		16406	16406	6-7-50	6-15-50	10-3-50
Ply. Spec.-Dlx. Conv. Cpe.	12457446	6-7-50	186831	229500	15	—	—	15594	15594	6-7-50	6-24-50	9-12-50
Dodge Coronet Clb. Cpe.	31508221	7-12-50	183687	225000	16	—	—	5117	5117	7-12-50	8-2-50	[illegible]
Dodge Coronet Clb. Cpe.	31515524	7-19-50	181036	249310	17	—	—	10084	10084	7-19-50	8-10-50	[illegible]-50
Dodge Coronet Sportabout	31532362	9-11-50	195600	288515	18	—	—	10878	10878	9-11-50	9-11-50	11-14-50
Dodge Coronet 4-Door	31451943	5-19-50	198950	248595	19	—	—	11066	11066	5-19-50	6-14-50	7-31-50
Ply. Spec.-Dlx. 4-Door	12183993	4-18-49	140637	125000	20	—	31269	27342	58611	4-18-49	4-22-49	[illegible]-1-50
Ply. Spec.-Dlx. Clb. Cpe.	12166079	3-31-49	145118	137500	21	—	32250	28217	60467	3-31-49	4-8-49	[illegible]-3-50
Ply. Spec.-Dlx. 4-Door	12193691	4-26-49	136312	159500	22	—	26518	26502	53020	4-26-49	5-3-49	[illegible]-14-50
Dodge Wayfarer 2-Door	37003691	5-25-49	149985	169500	23	—	25006	16664	41669	5-25-49	6-1-49	4-[illegible]-50
Ply. Spec.-Dlx. 4-Door	12133349	5-24-4[illegible]	193715	132500	24	—	32315	32280	64595	5-24-49	6-2-49	[illegible]
Ply. Spec.-Dlx. Clb. Cpe.	1223[illegible]09	6-13-4[illegible]	136656	149500	25	—	22776	22776	45552	6-13-49	6-25-49	[illegible]
Dodge Coronet Conv. Cpe.	31317353	6-28-49	208643	269500	26	—	28998	5725	34793	6-28-49	7-6-49	1-[illegible]-50
Ply. Spec.-Dlx. 4-Door	12211872	7-19-50	180000	140000	27	—	20000	35000	55000	7-19-50	8-15-49	7-28-50
Dodge Coronet 4-Door	31394705	10-6-49	166061	181970	28	—	9293	27632	36925	10-6-49	10-28-49	[illegible]-5-50
Ply. Spec.-Dlx. 4-Door	12363135	11-2-49	142960	145250	29	—	3975	27797	31772	11-2-49	11-15-49	7-6-50
Dodge Coronet Clb. Cpe.	31420178	12-21-49	186423	240000	30	—	—	31093	31093	12-21-49	1-3-50	[illegible]-27-50
Dodge Coronet 4-Door	31425592	12-22-51	186918	239500	31	—	—	41542	41542	12-22-51	1-3-50	1-11-50
Dodge D126 Pickup Trk.	81252709	4-19-48	117604	—	32	53562	39192	24850	117604	4-19-48	4-21-48	—
Harley-Davidson Serv.-Car	48 G 4656	7-30-48	99825	—	33	16665	33264	33264	83193	7-30-48	7-30-48	—
Dodge B108 Pickup Trk.	82076173	9-7-48	117065	—	34	9782	39012	39012	87806	9-7-48	9-16-48	—
Dodge HHG-128 Wrecker	80364506	3-29-49	332250	—	35	—	73838	110748	184586	3-29-49	4-29-49	—
Harley-Davidson Serv.-Car	49 G 1208	8-25-49	50066	—	36	—	5584	16656	22240	8-25-49	8-25-49	—
Indian Arrow Motorcycle	A 812713	8-25-49	86710	—	37		28904	28918	57822	8-25-49	8-25-49	—
Dodge M-Brook 4-Door	31144966	1-19-50	168441	—	[illegible]		—	46813	46813	1-19-50	2-1-50	
Ply. Spec.-Dlx. Clb. Cpe.	12442337	6-2-50	147660	—	39		—	24630	24630	6-2-50	6-8-50	—
Ply. Spec.-Dlx. Clb. Cpe.	12441749	6-2-50	147660	—	40	—	—	24630	24630	6-2-50	6-8-50	—
Ply. Spec.-Dlx. Clb. Cpe.	12446534	6-2-50	154220	—	41	—	—	25730	25730	6-2-50	6-8-50	—
Dodge Coronet 4-Door	31475947	6-7-50	183175	—	42	—	—	30535	30535	6-7-50	6-16-50	—
Ply. Spec.-Dlx. Clb. Cpe.	12457610	6-16-50	141102	—	43		—	23532	23532	6-16-50	6-23-50	—
Ply. Spec.-Dlx. Clb. Cpe.	12457503	6-16-50	141107	—	44			23532	23532	6-16-50	6-23-50	—
Ply. Spec.-Dlx. Clb. Cpe.	12441513	6-3-50	154435	—	45			25765	25765	6-3-50	6-13-50	—
Ply. Spec.-Dlx. Clb. Cpe.	12447545	6-7-50	147510	—	46			24600	24600	6-7-50	6-15-50	—

Sem 10

Date	Manner of Sale (Retail / Wholesale)	Used by	Primary Purpose		Duration of Use	Registration	Insurance	Finance
-30-50	Retail		Demonstrators	1	290 Days, approximately	TAGGED + TITLED IN COMPANY'S NAME. NO DEALER TAGS USED	Blanket Policy by company. Issued and [illegible] by [illegible]	CASH TRANSACTION NOT FINANCED
-26-50	"	Atlantic Discount Co.	Lease	2	132 Days "			
-4-50	"	Mrs. W.W. Massey		3	106 Days "			
-17-50	"	General Manager		4	79 Days "			
1-2-50	"	President		5	64 Days "			
-7-50	"	Gen. Sales Manager		6	61 Days "			
4-14-50	"	New Truck Sales Manager		7	115 Days "			
-27-50	"	Atlantic Discount Co.	Lease	8	82 Days "			
6-29-50	"	Vice President		9	60 Days "			
10-7-50	"	Gen. Sales Manager		10	117 Days "			
7-21-50	"	Atlantic Discount Co.	Lease	11	23 Days "			
10-25-50	"	" " "	Lease	12	136 Days "			
6-29-50	"	" " "	Lease	13	15 Days "			
10-3-50	"	" " "	Lease	14	111 Days "			
9-12-50	"	Bob Massey		15	81 Days "			
9-1-50	"	President		16	31 Days "			
10-30-50	"	Gen. Sales Manager		17	32 Days "			
11-14-50	"	President		18	65 Days "			
7-31-50	"	General Manager		19	48 Days "			
7-1-50	"	Atlantic Discount Co.	Lease	20	436 Days "			
2-3-50	"	" " "	Lease	21	302 Days "			
7-14-50	"		Lease	22	438 Days "			
4-14-50	"	New Truck Sales Manager		23	318 Days "			
6-29-50	"	Atlantic Discount Co.	Lease	24	393 Days "			
6-14-50	"	" " "	Lease	25	354 Days "			
1-19-50	"	Vice President		26	198 Days "			
7-25-50	"	Atlantic Discount Co.	Lease	27	345 Days "			
6-8-50	"	Transport Manager		28	224 Days "			
7-6-50	"	Atlantic Discount Co.	Lease	29	234 Days "			
7-27-50	"	President		30	206 Days "			
9-11-50	"	Mrs. W.W. Massey		31	252 Days "			
—			Service Truck	32				
—			light duty [illegible]	33				
—			Parts Del.	34				
—			Wrecker	35				
—			Service Del.	36				
—			[illegible]	37				
—		Atlantic Discount Co.	Lease	38				
—		" " "	Lease	39				
—		" " "	Lease	40				
—		" " "	Lease	41				
—		General Manager		42				
—		Atlantic Discount Co.	Lease	43				
—		" " "	Lease	44				
—		" " "	Lease	45				
—		" " "	Lease	46				

Coverage: New cars in Inventory: Fire, theft comprehensive. Company cars: Fire, theft, comprehensive, public liability and property damage.

Description	Serial Number	Date Purchased	Cost	Sale Price		Depreciation 1948	1949	1950	Total	Inventory Added to	Removed from	Returned to
50 Ply. Spec. Dlx. Clb. Cpe	12447489	6-7-50	147510	–	(47)	–	–	24600	24600	6-7-50	6-15-50	–
50 Dodge Coronet Diplomat	31548088	8-17-50	218469	–	(48)	–	–	24293	24293	8-17-50	8-29-50	–
50 Ply. Spec. Dlx. Conv. Cpe	12514449	8-23-50	~~172024~~	–	(49)	–	–	19128	19128	8-23-50	8-29-50	–
50 Dodge Coronet Diplomat	31553853	8-30-50	210765	–	(50)	–	–	17583	17583	8-30-50	9-15-50	–
50 Dodge Coronet Diplomat	31588778	10-16-50	197832	–	(51)	–		11002	11002	10-16-50	10-25-50	–
50 Dodge Coronet Clb. Cpe	31600773	10-12-50	173388	–	(52)	–		4828	4828	10-12-50	11-14-50	–
50 Dodge Coronet Diplomat	31614589	10-25-50	215012	–	(53)			5992	5992	10-25-50	11-16-50	–
50 Dodge Coronet Clb. Cpe	31492868	6-23-50	166389	–	(54)			22679	22679	6-23-50	7-31-50	–
50 Dodge B 108 Cab	82169852	6-30-50	114600	–	(55)			15927	15927	6-30-50	7-31-50	–
50 Dodge Coronet 4 Door	31526851	8-8-50	180225	–	(56)			15000	15000	8-8-50	9-1-50	–
50 Harley-Davidson Servi-Car	51G1158	10-1-50	116590	–	(57)	–		6498	6498	11-1-50	10-31-50	–
						80009	592495	1210542	1883046			

Date Sold	Manner of Sale: Retail	Manner of Sale: Wholesale	Used by	Primary Purpose		Duration of Use	Registration	Insurance	Financed
—	—	—	Atlantic Discount Co.	Lease	47		TAGGED + TITLED IN COMPANY'S NAME — NO DEALER TAGS USED	Blanket Policy by Company; Leased [illegible] by [illegible]	CASH TRANSACTION — NOT FINANCED
—	—	—	Vice President		48				
—	—	—	Bob Massey		49				
—	—	—	President		50				
—	—	—	Atlantic Discount Co.	Lease	51				
—	—	—	Sen. Sales Manager		52				
—	—	—	Mrs. M. J. Massey		53				
—	—	—	General Manager		54				
—	—	—		Parts and service	55				
—	—	—	General Manager		56				
—	—	—		Parts and service	57				

Massey Motors Inc.
Vehicles Used and Sold
Year Ended 12-31-51

Description	Serial Number	Date Received	Cost	Sale Price	Depreciation 1948	1949	1950	1951	Total	Added to Inventory	Removed from Inventory	Returned to Inventory
50 Dodge Coronet Diplomat	31548098	5-17-50	58	218469	299500	—	—	24293	1212	36429	5-17-50	6-29-50	2-28-51
50 Plym Blee - Dlx Coup Che	12514449	8-23-50	59	170124	199500	—	—	19128	9556	28684	8-23-50	6-29-50	2-7-51
50 Dodge Coronet Diplomat	31553853	8-30-50	60	240765	250000	—	—	17583	11708	29291	8-30-50	9-15-50	2-6-51
50 Dodge Coronet Diplomat	31588978	10-16-50	61	197832	259500	—	—	11002	10990	21992	10-16-50	10-25-50	2-23-51
50 Dodge Coronet Dlx Che	31600773	10-12-50	62	173388	201000	—	—	4828	9632	14460	10-12-50	11-14-50	2-12-51
50 Dodge Coronet Diplomat	31614589	10-25-50	63	215012	297645	—	—	5992	5972	11964	10-25-50	11-16-50	1-31-51
50 Dodge Coronet Cpe	31665432	1-9-51	64	224986	269500	—	—	—	31222	31222	1-9-51	1-30-51	6-14-51
51 Dodge Coronet Cpe	31671196	1-24-51	65	177351	244162	—	—	—	9867	9867	1-24-51	2-12-51	4-7-51
51 Dodge Coronet Dlx Che	31691613	2-14-51	66	189110	191704	—	—	—	10508	10508	2-14-51	3-6-51	5-30-51
51 Dodge Coronet 4-door	31718609	4-11-51	67	194477	202625	—	—	—	—		4-11-51	4-16-51	5-16-51
51 Dodge Coronet Dlx Che	31693633	3-29-51	68	248865	250000	—	—	—	27681	27681	3-29-51	4-24-51	8-25-51
51 Dodge Coronet Cpe Che	31693633	4-20-51	69	111905	130000	—	—	—	9341	9341	4-20-51	4-26-51	7-11-51
50 Ford 2-door Sedan	BOAT115098	4-27-51	70	195017	195017	—	—	—	5457	5457	4-27-51	5-16-51	7-5-51
51 Dodge Coronet 4-door	31257106	8-13-51	71	204333	210893	—	—	—	11383	11383	8-13-51	8-30-51	10-17-51
51 Dodge Coronet Diplomat	31838979	4-19-48	72	117614	79500	53562	39192	24850	—	117604	4-19-48	4-21-48	3-17-51
48 Dodge B-176 Cpe	81252209	9-7-48	73	117065	89500	49782	39012	24612	3251	91057	9-7-48	9-16-48	1-29-51
48 Dodge B108 Cpe	82076173	1-19-50	74	168441	185000			46813	23390	70203	1-19-50	2-1-50	5-10-51
50 Dodge M-Book 4-door	31444766	6-2-50	75	147660	130000			24630	20505	45135	6-2-50	6-8-50	5-25-51
50 Plym Blee - Dlx Clb Cpe	12442337	6-2-50	76	147660	137500			24630	28707	53337	6-2-50	6-8-50	7-2-51
50 Plym Blee - Dlx Clb Cpe	12441749	6-7-50	77	147510	140000			24600	36873	61473	6-7-50	6-15-50	9-12-51
50 Plym Blee - Dlx Clb Cpe	12447545	6-7-50	78	147510	115000			24600	20485	45085	6-7-50	6-15-50	5-30-51
50 Plym Blee - Dlx Clb Cpe	12447489	6-7-50	79	183175	191000			30535	15264	45799	6-7-50	6-16-50	3-3-51
50 Dodge Coronet 4-door	31485947	6-16-50	80	141102	120000			23532	19595	43127	6-16-50	6-23-50	5-30-51
50 Plym Blee - Dlx Clb Cpe	12457610	6-16-50	81	141102	135000			23532	23514	47046	6-16-50	6-23-50	6-20-51
50 Plym Blee - Dlx Clb Cpe	12457503	6-23-50	82	166389	199000			22679	18464	41163	6-23-50	7-1-50	4-16-51
50 Dodge Coronet Clb Cpe	31492868	8-8-50	83	180725	262985			15000	10338	25338	8-8-50	9-1-50	2-28-51
50 Dodge Coronet 4-door	31526851	12-11-50	84	188142	195000			—	41814	41814	12-11-50	1-22-51	9-1-51
51 Dodge Coronet 4-door	31663014	2-28-51	85	206813	287228			—	39143	39143	2-28-51	3-21-51	10-26-51
51 Dodge Coronet Diplomat	31698675	7-30-48	86	99825	—	16.65	33264	33264	16632	99825	7-30-48	730-48	
48 Harley-Davidson Trans-Cpe	48G4456	3-29-49	87	332250	—	—	73838	110748	110748	295334	3-29-49	4-29-49	
49 Dodge WKC 128 Wrecker	80264506	8-25-49	88	50000	—	—	5584	16656	16656	38892	8-25-49	8-25-49	
49 Indian Arrow Motorcycle	6812713	8-25-49	89	86710	—	—	28804	28918	28888	86710	8-25-49	8-25-49	
49 Harley-Davidson Servi-Car	49G1208	6-2-50	90	154220	—	—	—	25730	51386	77126	6-2-50	6-8-50	
50 Plym Blee - Dlx Clb Cpe	12440524	6-3-50	91	154435	—	—	—	25965	51468	77233	6-3-50	6-13-50	
50 Plym Blee - Dlx Clb Cpe	12441393	12-18-50	92	115351	—	—	—	—	35250	35250	12-18-50	1-5-51	
51 Dodge 1/2 Ton Pickup	8221077	12-19-50	93	131920	—	—	—	—	40320	40320	12-19-50	1-2-51	
51 Dodge 1/2 Ton Pickup	81295220	2-13-51	94	176063	—	—	—	—	45722	45722	2-13-51		
51 Dodge Coronet 4-door	31687313	2-5-51	95	185149	—	—	—	—	51431	51431	2-5-51	2-5-51	
51 Plym Cranbrook Cpe Che	12655748	1-18-51	96	175039	—	—	—	—	48627	48627	1-18-51	2-6-51	
51 Dodge Coronet Clb Cpe	31671234	2-15-51	97	139377	—	—	—	—	34855	34855	2-15-51	3-13-51	
51 Plym Cranbrook Clb Cpe	12678947	4-4-51	98	144835	—	—	—	—	32194	32194	4-4-51	4-6-51	
51 Plym Cranbrook Clb Cpe	12718620	5-17-51	99	145073	—	—	—	—	26232	26232	5-17-51	5-28-51	
51 Plym Cranbrook Clb Cpe	12720818	5-3-51	100	146073	—	—	—	—	28399	26399	5-3-51	5-18-51	
51 Plym Cranbrook Clb Cpe	12748943	3-31-51	101	145172	—	—	—	—	25744	26244	3-31-51	5-7-51	
51 Plym Cranbrook Clb Cpe	12715999	4-10-51	102	178775	—	—	—	—	41790	41790	4-16-51	5-8-51	
51 Dodge Coronet 4-door	31237688	6-15-51	103	145483	—	—	—	—	24753	24753	6-15-51	6-25-51	
51 Plym Cranbrook Clb Che	12716731												

[fol. 159]

Date Sold	Manner of Sale: Retail	Manner of Sale: Wholesale	Used by	Primary Purpose	No.	Duration of Use	Registration	Insurance	Financed
2-28-51	retail	—	Vice President		58	184 Days approximately	TAGGED + TITLED IN COMPANY NAME — NO DEALER TAGS USED	Covered by blanket policy by company. Leased cars covered by lessee	CASH TRANSACTION. NOT FINANCED
2-7-51	"	—	Bob Massey		59	173 Days "			
2-6-51	"	—	President		60	175 Days "			
2-23-51	"	—	Atlantic Discount Co.	Lease	61	122 Days "			
2-12-51	"	—	Gen Sales Manager		62	91 Days "			
1-31-51	"	—	Mrs. W. W. Massey		63	77 Days "			
6-19-51	"	—	Vice President		64	141 Days "			
4-7-51	"	—	Gen Sales Manager		65	55 Days "			
5-30-51	"	—	Gen Manager		66	86 Days "			
5-16-51	"	—	Gen Manager		67	31 Days "			
8-25-51	"	—	Vice President		68	124 Days "			
7-11-51	"	—	Atlantic Discount Co.	Lease	69	77 Days "			
7-5-51	"	—	Gen Manager		70	51 Days "			
10-17-51	"	—	Mrs. W. W. Massey		71	49 Days "			
3-17-51		—		Service	72	1061 Days "			
1-29-51		—		Parts Del.	73	866 Days "			
5-10-51		—	Atlantic Discount Co.	Lease	74	463 Days "			
5-25-51	"	—	" " "	Lease	75	351 Days "			
7-2-51	"	—	" " "	Lease	76	389 Days "			
9-12-51	"	—	" " "	Lease	77	455 Days "			
5-30-51		—	" " "	Lease	78	351 Days "			
3-3-51		—	Gen Manager		79	261 Days "			
5-30-51		—	Atlantic Discount Co.	Lease	80	342 Days "			
6-20-51	"	—		Lease	81	362 Days "			
4-16-51		—	Gen Manager		82	290 Days "			
2-28-51		—	Gen Manager		83	181 Days "			
9-1-51	"	—	Mrs. W. W. Massey		84	223 Days "			
10-26-51	"	—	President		85	219 Days "			
				Parts Del	86				
				Wrecker	87				
				Messenger Ser.	88				
				Service Del	89				
			Atlantic Discount Co.	Lease	90				
			" " "	Lease	91				
				Parts Del	92				
				Service Truck	93				
			Gen Manager		94				
			Bob Massey		95				
			Gen Sales Manager		96				
			Atlantic Discount Co.	Lease	97				
			" " "	Lease	98				
			" " "	Lease	99				
			" " "	Lease	100				
			" " "	Lease	101				
			" " "	Lease	102				
			" " "	Lease	103				

Description	Serial Number	Date Purchased	No.	Cost	Sale Price	1948	1949	1950	1951	Total	Leased to	Inventory Returned from	Returned to
						Depreciation							
51 Ply Cranbrook Clb Cpe	12789544	6-18-51	104	144485	—	—	—	—	24095	24095	6-18-51	6-30-51	
51 Ply Cranbrook Clb Cpe	12788616	6-18-51	105	145880	—	—	—	—	24000	24000	6-18-51	6-30-51	
51 Ply Cranbrook Clb Cpe	12798752	6-25-51	106	146625	—	—	—		20393	20393	6-25-51	7-16-51	
51 Ply Cranbrook Clb Cpe	12801672	6-22-51	107	147326	—	—	—		20474	20474	6-22-51	7-30-51	
51 Dodge Coronet Diplomat	31794365	6-18-51	108	219751	—	—	—		30527	30527	6-18-51	7-31-51	
51 Ply Cranbrook Clb Cpe	12841789	8-20-51	109	146437	—	—			16293	16293	8-20-51	8-31-51	
51 Ply Cranbrook Clb Cpe	12825388	7-26-51	110	145705	—	—	—		16197	16197	7-26-51	8-16-51	
51 Ply Cranbrook Clb Cpe	12842201	8-20-51	111	146187	—	—	—		8147	8147	8-20-51	10-9-51	
51 Dodge Coronet Conv Cpe	31847200	9-12-51	112	219101		—			12177	12177	9-12-51	10-15-51	
51 Dodge Coronet Clb Cpe	31848497	9-14-51	113	185354		—			10832	10832	9-14-51	10-26-51	
52 Dodge Coronet 4 Door	31872104	10-25-51	114	207089	—	—			5769	5769	10-25-51	11-19-51	
51 Ply Cranbrook Clb Cpe	12884443	10-29-51	115	151972	—	—			4237	4237	10-29-51	11-9-51	
50 Dodge 1/2 [illegible]	82169852	6-30-50	116	114600		—		15927	38196	54123	6-30-50	7-1-50	
51 Harley-Davidson Servi-Car	51G1158	10-1-50	117	116590		—		6498	38856	45354	10-1-50	10-1-50	
51 Dodge Coronet 4-Door	31726011	4-25-51	118	193892		—			37727	37727	4-25-51	5-31-51	
						800,09	2197941	670745	1482042	2456590			

Date sold	Manner of Sale Retail	Manner of Sale Wholesale	Used by	Primary Purpose		Duration of Use	Registration	Insurance	Financed
			Atlantic Discount Co.,	Lease	104		TAXED + TITLED IN COMPANY NAME - NO DEALER TAG USED.	Covered by blanket policy by company Lease used covered by Lessee	CASH TRANSACTION - FINANCED
			" " "	Lease	105				
			" " "	Lease	106				
			" " "	Lease	107				
			Vice President "		108				
			Atlantic Discount Co.,	Lease	109				
			" " "	Lease	110				
				Lease	111				
			Mrs. W. W. Massey "		112				
			President		113				
			Mrs. W. W. Massey		114				
			Atlantic Discount Co.	Lease	115				
				Parts + Service	116				
				Parts + Service	117				
			Gen Manager						

U.S. Treasury Dept.
(Revised Jan. 1952)

Name of Taxpayer [illegible]

Index: Page 1
Pages:
Schedules:
Exhibits:

Date of Report April 10, 19 53

Examining Officer Kenneth Johnstone

PRELIMINARY STATEMENT OF TOTAL TAX LIABILITY

YEAR	LIABILITY		PREVIOUSLY ASSESSED		ADJUSTMENTS PROPOSED THIS REPORT			
					Tax		Penalty	
	Tax	Penalty	Tax	Penalty	Def.	O/A	Def.	O/A
			INCOME TAX					
1950	$119,394.58	- 0 -	116,381.55	- 0 -	3,012.99	-0-	- 0 -	- 0 -
1951	138,066.45	- 0 -	133,148.03	- 0 -	4,918.46	-0-	- 0 -	- 0 -
Total	257,461.03	- 0 -	249,529.58	- 0 -	7,931.45	-0-	- 0 -	- 0 -
Total								
Total								

Summary of Adjustments of Assessments Year 19___

	Income Tax			
Originally assessed - - - - - - - -				
Deficiency assessed, 19___ - - -				
Overassessment Scheduled, 19__ -				
Net Previous Assessments - - - -				

Year 19___

Originally assessed - - - - - - -				
Deficiency assessed, 19___ - - -				
Overassessment scheduled, 19__ -				
Net Previous Assessments- - - -				

Vol. 161

Plaintiff's Exhibit 5

151

Name of Taxpayer Massey Motors, Inc.

PRELIMINARY STATEMENT

Principal cause(s) of the additional tax liability is disallowance of depreciation on company cars and conversion of the gain reported thereon from capital gain to ordinary income per decision of the Tax Court of the United States in W. R. Stephens Company v. Commissioner of Internal Revenue, Docket No. 22681.

The findings have been discussed with Mr. W. W. Massey, President and counsel.

Was agreement procured? No. Thirty-day letter requested.

Remarks: None.

TABLE OF CONTENTS

Pages 1 - 12, inclusive

Schedules 1 - 4, inclusive

Exhibits A-B-C, inclusive

(Detailed index to be prepared where case justifies same)

[fol. 163]

Form 886—Rev. Jan. 1938
TREASURY DEPARTMENT
Internal Revenue Service

Name Massey Motors Inc. & Atlantic Motor Sales, Inc.

Schedule 1 Year Period ended 12/31/50

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return			$ 278,197	87
As corrected			282,146	69
Net adjustment as computed below			3,948	82
Unallowable deductions and additional income:				
(a) Depreciation-company cars	$ 9,347	09 X		
(b) Gain on sales of company cars	11,561.	94 X		
( )				
( )				
( )				
( )				
( )				
TOTAL			$ 20,909	03
Nontaxable income and additional deductions:				
(a) Capital gain	$ 16,960	21		
( )				
( )				
( )				
( )				
TOTAL			$ 16,960	21
Net adjustment as above			3,948	82

U. S. GOVERNMENT PRINTING OFFICE 16—51809-1

153

Name: Massey Motors, Inc.

Schedule: 1-A Year 1950

Explanation of Items

(a) Depreciation-Company Cars $ 9,347.09

Depreciation on company cars has been reduced from the $12,105.82 reported to $ 2,758.73 as shown by Exhibit A. Except for the items of equipment shown therein, so called company cars are held to be stock-in-trade and not subject to allowance for depreciation.

(b) Gain on Sale of Company Cars $11,561.94

Gain of $16,960.21 reported on sales of company cars has been reduced by the elimination of applicable depreciation in the amount of $5,398.27 disallowed in (a) above, and resulting gain of $11,561.94 is held to be ordinary gain.

(c) Capital Gain $16,960.21

Capital gain reported on sales of company cars has been eliminated in connection with adjustment (b), above.

Form 886—Rev. Jan. 1938
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

[fol. 166]

Name Massey Motors Inc. & Atlantic Motor Sales, Inc.

Schedule 3 Year ~~Period~~ ended 12/31/51

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return			$ 267,661	93
As corrected			273,342	50
Net adjustment as computed below			5,680	57
Unallowable deductions and additional income:				
(a) Depreciation - Company Cars	$ 11,572	45		
(b) Repossession ~~resource~~	2,177	54		
(c) Gain on sale of company cars	5,616	96		
( )				
( )				
( )				
( )				
TOTAL			$ 19,366	95
Nontaxable income and additional deductions:				
(c) Capital Gain	$ 13,686	38		
( )				
( )				
( )				
( )				
TOTAL			$ 13,686	38
Net adjustment as above			5,680	57

U. S. GOVERNMENT PRINTING OFFICE 16-61069-1

Name: Massey Motors, Inc. & Atlantic Motor Sales, Inc.

Schedule: 3-A

Year 1951

Explanation of Items

(a) Depreciation - Company Cars $ 11,572.45

Depreciation on company cars has been reduced from $14,860.42 to $3,287.97 as shown in Exhibit A.

(b) Repossession Reserve $ 2,177.54

Reserve of $ 2,177.54 based on 3% of $ 72,584.95 due from finance company is not properly excludible from income. Please see Section 43 of the Internal Revenue Code.

(c) Gain on Sale of Company Cars $ 5,616.96

Capital gain of $15,926.69 reported on sales of company cars and leasehold has been decreased by the elimination of applicable depreciation in amounts of $3,433.77 and $4,635.65 disallowed in 1950 and 1951 and, except for gain shown per Exhibit A, is held to be ordinary income.

Capital Gain reported	$15,926.69
Disallowed depreciation	8,069.42 (24)
Corrected gain	7,857.27
Less corrected capital gain-Exhibit A	2,240.31
Ordinary income	$ 5,616.96

(d) Capital Gain $ 13,686.38

Except for gain of $1,429.92 on sales of two trucks as shown by Exhibit A capital gain of $15,116.30 reported on sales of company cars has been eliminated in connection with adjustment (c) above.

13686.38
2069.42
-3616.96

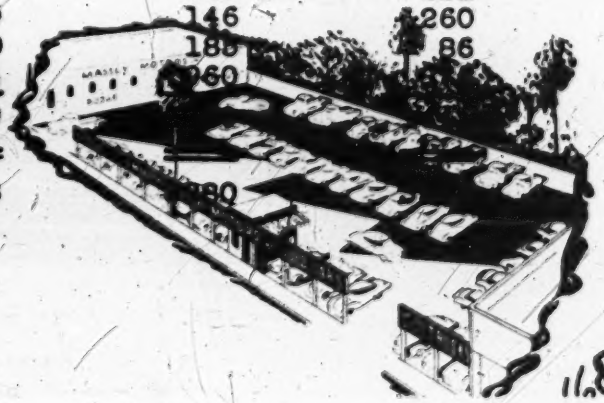
BREAKDOWN FOR MASSEY MOTORS, INC. AND ATLANTIC MOTOR SALES, INC. SHOWING GROSS PROFITS BY EACH DEPARTMENT FOR 1950, 1951, 1952 & 1953

MASSEY MOTORS, INC.	1950	1951	1952	1953
New Car Department	$527,929.76	$557,699.48	$463,686.80	$414,451.56
Used Car Department	154,221.60	179,117.47	187,893.79	235,279.50
Stockroom (Parts)	102,318.53	84,681.93	90,107.25	91,727.25
Service	122,443.49	122,383.12	111,091.73	93,965.61
Total Massey	$598,470.18	$585,647.06	$476,991.99	$364,864.92
ATLANTIC MOTORS				
New Car Department	$231,632.17	$310,407.59	$240,111.40	$229,593.15
Used Car Department	97,936.06	98,347.37	80,264.23	116,330.90
Stockroom (Parts)	18,592.85	22,980.82	20,408.39	25,310.27
Service	23,861.43	37,898.14	31,071.42	33,114.41
Total Atlantic	$176,150.39	$272,939.18	$211,326.98	$171.686.93
GRAND TOTAL MASSEY AND ATLANTIC	$774,620.57	$858,586.24	$688,318.97	$536,551.85

. . . . . .

NUMBER OF NEW AND USED UNITS SOLD BY MASSEY MOTORS, INC. AND ATLANTIC MOTOR SALES, INC. FOR THE SAME PERIOD.

MASSEY MOTORS, INC.	1950	1951	1952	1953
New Dodge	778	682	624	518
New Plymouth	424	428	357	519
New Dodge Trucks	373	590	293	156
Used Units	1510	1479	1166	919
Total Massey	3085	3179	2440	2112
ATLANTIC MOTORS				
New Dodge	280	306	249	221
New Plymouth	126	179	146	260
New Dodge Trucks	160	370	185	86
Used Units	548	1144	260	
Total Atlantic	1114	1999		
				5178



118

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 24 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. ~~1037~~ 141

MASSEY MOTORS, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES P. HILL
816 Atlantic Bank Building
Jacksonville, Florida

JOHN A. RUSH
301 Florida Theatre Building
Jacksonville, Florida

WILLIAM R. FRAZIER
816 Atlantic Bank Building
Jacksonville, Florida

Attorneys for Petitioner

INDEX

CITATIONS

IN THE

Supreme Court of the United States

October Term, 1958

No.

MASSEY MOTORS, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled cause on February 26, 1959.

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court as amended are reported in 156 Fed. Supp. 516, and are also set forth in the record, pages 105 to 121, and pages 121 to 124. The opinion of the Court of Appeals is reported

at 264 Fed. 2d 552. (Appendix A, infra, p. 10).

JURISDICTION

The judgment of the Court of Appeals was entered on February 6, 1959. (Appendix B, infra, p. 26). On May 22, 1959, the time for filing a petition for writ of certiorari was extended by order of Mr. Justice Black to and including July 13, 1959. (Appendix C, infra, p. 27). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether petitioner, a retail automobile dealer, is entitled to utilize a "useful life" of three years in computing depreciation with respect to certain company and rental cars used by it in the operation of its business and an estimated salvage value at the end of such three-year period in filing its Federal corporate income tax return for the calendar years 1950 and 1951.

STATUTE INVOLVED

The statutory provision involved is Section 23(l) of the Internal Revenue Code of 1939, which is set forth in Appendix D, infra, p. 28).

STATEMENT

The Petitioner is a Florida corporation with principal office at Jacksonville, Florida, and holds a franchise from Chrysler Corporation for the retail and wholesale sale of Plymouth and Dodge automobiles in Florida and Georgia.

Petitioner owned all of the issued and outstanding capital stock of Atlantic Motor Sales, Inc., which was located in Jacksonville and was also a franchise Chrysler dealer handling substantially the same products as those sold by Petitioner. For the taxable years in question, namely, the taxable years 1950 and 1951, Petitioner and its wholly-owned subsidiary filed a consolidated Federal income tax return.

Petitioner, during the years involved, employed between 85 and 120 persons in the operation of its business. The Petitioner also appointed associate dealers under an arrangement whereby merchandise was purchased from Chrysler and, in turn, sold to the associate dealers. Chrysler Corporation had no authority to sell merchandise directly to an associate dealer and its representatives had no authority to call on an associate dealer without a member of Petitioner's staff being present. During the taxable years, Petitioner had three associate dealers. Petitioner assisted its associate dealers in promotion work in connection with the sale of Chrysler automobiles, trucks and parts and, in general, supervised the operation of its associate dealers in much the same way that Chrysler supervised and directed its own retail dealers.

During the years involved, Petitioner's management withdrew certain automobiles from its inventory which were placed in company use.

Also, during the same years, Petitioner leased certain automobiles to Atlantic Discount Company, an automobile finance company, at a net rental of three cents per mile, payable monthly. During 1950, Petitioner had 51 company cars in service, of which 23 were leased to Atlantic Discount Company. The leased cars were used by company personnel of the finance company in the operation of its business.

In 1950, Petitioner sold 27 of the 51 company cars in service. During 1951, the taxpayer had 53 company cars, of which 26 were leased to Atlantic Discount Company. Petitioner sold 23 of these cars in 1951. Petitioner received rental income in the respective amounts of $5,433.55 and $7,288.22 during 1950 and 1951 from Atlantic Discount Company under the leasing arrangement. Atlantic Discount Company, Inc., paid all costs of operating and maintaining the leased vehicles, including the cost of all necessary collision and public liability insurance. During the taxable years, Petitioner incurred annual expenses of approximately $5,000-$6,000 in maintaining and operating its company cars.

Petitioner did not drive the new and used cars and trucks it held for retail sales to customers, except for necessary driving for servicing and delivery and these cars were not registered in its name under the Motor Vehicle Registration Laws of the State of Florida.

As a matter of bookkeeping procedure, Petitioner charged all cars and trucks its obtained from Chrysler Corporation into account No. 131 on its ledger. When any cars or trucks were placed in company use or in rental service, an entry was made to remove these vehicles from account No. 131, which was an inventory account, and to place them in the company car account, No. 167, a fixed asset account.

The decision to place cars in company or rental use was made by Petitioner's top management. As a car was placed in company use, it was covered with fire, theft, comprehensive public liability and property damage insurance for the exclusive benefit of Petitioner. Regular license plates were procured for each of the cars registered in Petitioner's name and the automobile was paid for in full in cash. Dealer tags

were never used on any of the cars employed for company business use.

The company cars were used by various of Petitioner's officials and its wholly-owned subsidiary, Atlantic Motor Sales, Inc., in the general course of everyday business, which included, among other things, traveling to and from the various locations maintained by both corporations. The cars were also used in making bank deposits, messenger service, trips to post office and for loan to customers in need of transportation. The cars were also used to permit managers and other company personnel to travel for business purposes to cities such as Atlanta, Georgia, and Tampa, Florida, for new car showings and other types of factory meetings. The cars were also used by taxpayer in its contact with associate dealers and used in various civic functions, such as parades, etc. Petitioner's business could not have operated successfully without the use of the company cars.

Petitioner followed the practice of disposing of all company and rental cars as soon after annual model change as was practicable. Petitioner's management deemed it advisable to have the company personnel in current model cars. Petitioner also disposed of its rental cars during the year the particular unit had run approximately 40,000 miles. Company cars were also removed from service when they had run approximately 10,000 miles, without regard to model change.

Petitioner, in filing its consolidated Federal income tax return for the calendar years 1950 and 1951, deducted the respective sums of $9,346.69 and $11,572.45 as depreciation on its company cars, including those rented to Atlantic Discount Company, Inc. It computed this depreciation on the straight line method, utilizing an estimated useful life of 36 months.

During the calendar year 1950, Petitioner sold 27 of the 51 company cars in use and under lease, of which 16 were held less than six months prior to date of sale. Petitioner reported a short-term capital gain in the amount of $10,247.00 with respect thereto. The remaining 11 cars were held more than six months and Petitioner reported the long-term capital gain in the amount of $6,713.21 with respect thereto, under the provisions of Section 117(j) of the Internal Revenue Code of 1939. During the calendar year 1951, Petitioner sold 23 of the 53 cars in company use and under rental, of which 9 were held less than six months. Petitioner reported a short-term capital gain in the amount of $6,760.41 with respect thereto. Of the remaining 14 cars, depreciation and long-term capital gains treatment was allowed by the Commissioner as to two and they are not here in issue. The remaining 12 cars sold were held for more than six months prior to the date of sale and Petitioner reported a long-term capital gain in the amount of $6,925.97 with respect thereto.

The Commissioner of Internal Revenue, in causing Petitioner's returns to be audited for the calendar years 1950 and 1951, determined that Petitioner was not entitled to any depreciation on the company cars in question, on the theory that all of the cars constituted stock in trade and were not therefore subject to an allowance for depreciation. Accordingly, the Commissioner also disallowed long-term capital gains treatment claimed under Section 117(j) with respect to the profits realized from the sale of the cars.

Following the audit, Petitioner paid the resulting deficiencies and interest in full, filed claims for refund within the time prescribed by law and in due course instituted a suit for refund in the District Court for the Southern District of Florida, Jacksonville Division, seeking an adjudication of its

liability for the deficiencies.

The examing agent also restored to income for the taxable year 1951 the sum of $2,177.54, which Petitioner had excluded. The amount which Petitioner had excluded from its income for the year 1951, represented a portion of a finance company reserve holdback, which grew out of Petitioner's assignment of conditional sales contracts to the finance company, which company withheld a portion of the proceeds of sale in a reserve account in Petitioner's name.

The District Court held that Petitioner was entitled to the depreciation claimed on its returns for 1950 and 1951 and that the capital gains set forth thereon were taxable as long-term capital gains under Section 117(j) of the Internal Revenue Code of 1939.

The District Court also held that Petitioner had properly excluded a portion of its finance reserve holdback from income during the calendar year 1951.

Following the decision of the District Court, the respondent took an appeal to the Court of Appeals for the Fifth Circuit. The Court of Appeals, on February 26, 1959, in a split decision, reversed the District Court on the issue of depreciation and capital gains with respect to Petitioner's company and rental cars, and affirmed the District Court with respect to the finance holdback issue.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is in direct conflict with the decision of the Court of Appeals for the Ninth Circuit in *Evans v. Commissioner*, 264 Fed. 2d 502, decided

January 26, 1959, with respect to the depreciation issue involved in this case. This conflict is expressly conceded and recognized by the Court of Appeals for the Fifth Circuit (Appendix A. p. 22 to 23).

2. A determination of the question involved by this Court is clearly in the public interest. It is obviously highly important in the present state of our economy operating under the burden of an extremely high Federal income tax structure, that taxpayers should be adequately advised as to the proper method of computing depreciation deductions for income tax purposes. The Court of Appeals, in the present case, has, in effect, held that in computing depreciation for Federal income tax purposes, each taxpayer is to utilize a useful life as determined by the history of use of a particular asset in its own business, as compared to utilizing a useful life which is inherent in the asset and would normally be used by taxpayers in general. The theory of the Court below adds another area of uncertainty, confusion and lack of objectivity in the administration and application of our Federal income tax statute.

Further in this connection, it is understood that the Office of the Solicitor General will not oppose the granting of this writ and will probably file a petition for a writ of certiorari in *Evans v. Commissioner* so as to bring this matter squarely before the Court.

3. The majority decision below is believed to be erroneous, and, as stated above, is in direct conflict with the decision of the Ninth Circuit in *Evans v. Commissioner*. The Ninth Circuit, in its opinion in the *Evans* case, referred to the decision of the District Court in the instant case with approval. We believe the Court of Appeals for the Ninth Circuit correctly

held that under Section 23(1) of the Internal Revenue Code of 1939, the language of the applicable Treasury regulations, Section 29.23(1), the consistent practice and position of the Commissioner over many years and the interpretation placed on the term "useful life" by decisions of the Tax Court extending over a long period, the useful life of a depreciable asset is its physical or economic life, as opposed to measuring such useful life by the period during which such asset was held in the business of a particular taxpayer.

CONCLUSION

For the foregoing reasons, it is submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JAMES P. HILL
816 Atlantic Bank Building
Jacksonville, Florida

JOHN A. RUSH
301 Florida Theatre Building
Jacksonville, Florida

WILLIAM R. FRAZIER
816 Atlantic Bank Building
Jacksonville, Florida
Attorneys for Petitioner

Dated June 19, 1959

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17279

UNITED STATES OF AMERICA,

Appellant,

versus

MASSEY MOTORS, INC.,

Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

(February 26, 1959.)

Before RIVES, TUTTLE and CAMERON, Circuit Judges.

TUTTLE, Circuit Judge: The United States in this appeal attacks the judgment of the trial court permitting the appellee taxpayer to take straight line depreciation figured on the entire useful life on certain company-used automobiles sold by the automobile dealer taxpayer after relatively short use by it generally for more than the original cost to the taxpayer.

Appellee is a franchised Chrysler dealer in Jacksonville, Florida. This case differs from *Duval Motor Company v. Commissioner of Internal Revenue*, 5 Cir., ... F. 2d. ...., decided today in that on this appeal it is conceded by the government, following a finding to such effect by the trial court, that the automobiles here in issue were property used in the trade or business of the taxpayer.[1]

Massey Motors, Inc., a franchised Chrysler dealer, withdrew from the new cars bought by it during the calendar (and tax) years 1950 and 1951, 51 and 53 automobiles respectively. Of these it assigned approximately one half to its executives and other employees for transportation in connection with the company's business. The other half it rented to an unaffiliated finance company at a net rental of 3 cents a mile. From this rental operation it made a substantial net profit. The executives' cars were uniformly sold at the end of 8,000 to 10,000 miles use or the advent of new models, whichever was earlier. The rental cars were sold at the advent of new models or upon 40,000 miles of use. In nearly every instance the company used cars were sold at a substantial profit above the cost, and on the average the rented cars were likewise sold at a profit.[2] The taxpayer figured depreciation on all of

---

1 No salesmen's automobiles were involved in this case, and there was no evidence that any of these cars were used substantially for any purpose different than if they had been automobiles of a different make from those taxpayer was franchised to sell. On the undisputed facts of this record it seems to us that a respectable case might be made for the proposition that as a matter of of law these automobiles sold within the same model year as when bought, and sold generally at a profit above original cost without allowance for depreciation, were held primarily for sale to customers in the ordinary course of taxpayer's business. Since the government does not urge this position, however, and since it is not argued here, we shall not deal further with it.

2 The executives' cars here in issue were sold for $11,272.80 more than their cost and the rental cars were sold for $525.89 more than they cost.

the cars on the straight-line basis with no allowance for salvage value. Gains on the sales were computed at capital gains rates with a basis of cost less depreciation.

The Commissioner disallowed the capital gains treatment of the gains and also disallowed the depreciation, contending that the automobiles were not property used in the trade or business under Section 117(j) of the Internal Revenue Code of 1939, because they were held primarily for sale to customers in the ordinary course of taxpayer's trade or business. The taxpayer paid the resulting deficiency and thereafter filed its claims for refund for the two years. The claims asserted that "the taxpayer contends that it is entitled to a reasonable allowance for depreciation as claimed on the aforementioned automobiles, constituting property used in the trade or business ... and that the gain realized by it on the sale of said automobiles is reportable as long term capital gain pursuant to the provisions, etc."[3] Upon the disallowance of the claim the suit for refund was filed in the District Court.

The record discloses that the only evidence introduced below related to the business methods of the taxpayer touching on the use of company and rental cars and their subsequent sale, the essential parts of which are stated above, and testimony as to a small "reserve for repossessions," later discussed. No evidence was introduced on the depreciation issue apart from that relating to company practices. The trial court held in favor of the taxpayer on the capital gains treatment on the sale of the cars and also made a finding that the

---

3 This claim, which was of course made the basis of the subsequent suit, demonstrates the fallacy of appellee's contention here that the issue of depreciation was not separately raised in the trial court. Taxpayer put this matter in issue. Where the Commissioner makes a determination disallowing depreciation, the burden is on the taxpayer to prove the correctness of the depreciation claimed.

rate of depreciation, utilizing a 36-months estimated useful life without deducting any salvage value, was a reasonable and fair rate.

The government here attacks this finding a... the court's conclusion that the claimed depreciation should be allowed. The thrust of its position is that depreciation must be figured with relation to the known useful life of the asset in the hands of the taxpayer rather than the entire useful life of the property itself; that depreciation cannot be figured without considering the salvage value at the end of the useful life in the hands of the taxpayer; that it was demonstarted here that the useful life in the hands of Massey Motors, Inc. was less than a year; and that the salvage value more than equaled original cost; thus the depreciation would be zero.

Taxpayer, to the contrary, asserts that whatever may have once been the meaning of useful life "and whatever meaning it may have under current Treasury Regulations promulgated following enactment of the 1954 Code, at the time here in question 'useful life' meant the whole useful life of the property itself without regard to the length of time it was intended by the taxpayer that it would be used by him; that the salvage value should properly be that value at the end of the life of the automobiles after they had served their total useful life in the hands of all owners; that total useful life of these automobiles was three years, and that no salvage value would remain thereafter." This is in effect what the trial court held. In light of the facts here that these cars, other than the rented cars, were used approximately 8,000 to 10,000 miles during the first year, and even in the case of the rented cars that they still had a value equaling their cost at the end of the first of the three years, such a holding is so contrary to our knowledge of the facts of life that it must

bear close scrutiny.

The statute provides simply that the taxpayer may take as a deduction under the heading of "Depreciation," "a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence) (1) of property used in the trade or business."

There is no real dispute between the parties here as to the meaning of the statutory terms. Conceptually depreciation is properly a deductible item because the natural wear and tear upon the capital items which a taxpayer uses to produce his income is a cost element in the production of income. The Supreme Court said in 1926:

> "The amount of the allowance for depreciation is the sum which should be set aside for the taxable year, in order that at the end of the useful life of the plant *in the business* the aggregate of the sums set aside will (*with the salvage value*) suffice to provide an amount equal to original cost." (Emphasis added.) *United States v. Ludey*, 274 U.S. 295, 300, 301.

We think it clear that the words "of the plant" in this opinion refer to all depreciable assets alike, not only the fixed assets. Appellee here agrees in its brief that a salvage value must be determined before the application of straight line depreciation over a three year life.[4] It is unfortunate that appellee did not "recognize" this principle when it submitted the case to the trial court rather than insist it was entitled

4 In its brief appellee states: "We readily recognize the fact that the cost of a business asset depreciated on the straight line method should first be reduced by the estimated salvage value before applying the rate of depreciation in accordance with the decision of the Supreme Court in United States v. Ludley, 274 U.S. 295."

to straight three years' depreciation, which it improperly deducted, contrary to all recognized accounting and legal principles, and thus induced so apparent an error in the judgment of the trial court.[5] Taxpayer's brief concedes[4] that if this question is properly before the court, as we have found it is, the case must be remanded to the trial court to permit it to prove the salvage value—an essential part of its case which it failed to prove on the first trial. It might be simpler for us to reverse the erroneous judgment thus induced by taxpayer and enter judgment dismissing this part of the appellee's suit for failure of proof. However, since we do not feel that substantial justice would be achieved without allowing an opportunity for taxpayer to furnish the proof necessary under the principles of law properly applicable to the case, we shall not give it that direction.

The principal difficulty in figuring depreciation on property of the kind here used is that it is quite doubtful that Congress ever intended that automobiles temporarily used by people in the business of selling automobiles should be subject to depreciation at all. See *Duval Motor Company v. Commissioner of Internal Revenue, supra.* As illustrated by the facts in this record, depreciation of $347.93 on a company car, bought for $2083.43, for a holding period of six and a half months, followed by a sale on a capital gains basis of $2695.00 offends all ideas of the real purpose of allowing de-

---

5 Having filed its claim for refund on its assertion that "it is entitled to a reasonable allowance for depreciation *as claimed* on the aforementioned automobiles" (emphasis added) the taxpayer squarely assumed the burden of proving the reasonableness of the now concededly erroneous schedule. As pointed out above, there is no merit in taxpayer's contention that the court's finding in favor of this erroneous schedule is not properly before us for consideration.

preciation.[6] Recognizing full well that tax effects on businesses are not always uniform and, more important, that the incidence of federal taxation is statutory and not always strictly equitable, or always logical, we think it quite appropriate to consider the apparently unintended result that follows from an asserted construction of the tax laws in performing our duty to construe the language of a statute.

The Tax Court, with the acquiescence of the Commissioner, in *Latimer-Looney Chevrolet Co., Inc. v. Commissioner*, *supra*, and the trial court in this case having held, without appeal on the part of the government, that cars such as these here in issue are property used in the trade or business and are thus subject to depreciation, it now becomes necessary for us to apply the statute on depreciation with such light as can be gleaned from the Treasury Regulations and the Tax Court and trial and appellate court decisions.

Taxpayer urges that the construction it advances is consistent with that promulgated by the Commissioner himself, since in Regulations in effect during the tax years in question it is stated:

> "The capital sums to be recovered shall be charged off over the useful life of the property, either in equal annual installments, or in accordance with any other recognized trade practice, such as an appointment of the capital sum over units of production." Treasury Reg. 702, Sec. 29.33 (l-5) 1939 Code.

---

6 As we roughly compute the tax savings, *solely because of the use of depreciation on these company cars* where they are accorded capital gains treatment on sale, the automobile mentioned above, instead of yielding Massey Motors a return after taxes, of $250.38 on the suggested Chrysler mark-up of 25%, the automobile, after seven months' use by the company, would yield a return, after taxes, of $550.34.

Taxpayer contrasts this with the language in corresponding regulations in existence prior to 1942, the date of the promulgation of the above quoted language. In point of fact, there is no change in the language in the corresponding sections which deal with "Method of computing depreciation." Both before and after 1942 the relevant language of this section of the Regulations was the same. See Section 27.23 (1-5) for 1939 and as amended on Dec. 8, 1942. The change in language in regulations under the depreciation section of the 1939 Code appears in Section 29.23(1-1). Prior to Dec. 8, 1942, this section, which in reality appears to be a definition section rather than a regulation telling how to compute depreciation, provided in essential part:

> "A reasonable allowance for the exhaustion, wear and tear, and obsolescence of property used in the trade or business may be deducted from gross income. For convenience such an allowance will usually be referred to as depreciation .... The proper allowance for such depreciation of any property used in the trade or business is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not necessarily at a uniform rate), whereby the aggregate of the amounts so set aside, plus the salvage value, will, at the end of the *useful life of the property in the business*, equal the cost or other basis of the property ..." (Emphasis added.)

Taxpayer here seems to concede, as we think it must, that if this regulation had been in effect during the tax years here in issue, the useful life of the automobiles would be the life in the hands of the taxpayer. In fact we think the quoted language from *United States v. Ludey, supra*, is determinative of the matter. It clearly says the test is *the end of the useful*

life of the plant in the business.

Taxpayer points to a change in the amended regulations promulgated in 1942, as indicating change in the Commissioner's interpretation of the statute in this respect.

The corresponding language of the 1942 amended regulation is as follows:

> "A reasonable allowance for the exhaustion, wear and tear, and obsolescence of property used in the trade or business, *or treated under [Reg.] section 19.23 (a)-15 as held by the taxpayer for the production of income* may be deducted from gross income. For convenience such an allowance will usually be referred to as depreciation .... The proper allowance for such depreciation is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not necessarily at a uniform rate), whereby the aggregate of the amounts so set aside, plus the salvage value, will, at the end of the useful life of the *depreciable property*, equal the cost or other basis of the property ...."

It will be apparent that in the last sentence the words "property in the business" has been eliminated and the words "depreciable property" substituted. A cursory look at the legislative history back of this amendment clearly demonstrates that there was no purpose to express a change in what was meant by useful life. This change was necessitated by an amendment in 1942 to the 1939 Code, which *added* as property entitled to depreciation "property held for the production of income." Thus the regulation which had theretofore dealt only with property used in the trade or business was

inadequate, and it had to be amended by the inclusion of the italicized words above. The last sentence could not, of course, thereafter adequately cover both classes of property by referring to "property in the business" because this would not include the new class "property held for the production of income." The language "depreciable property" would, of course, cover both, and it was substituted for "property in the business."

Thus, we think it clear that whatever was understood by the Treasury Department prior to 1942 by useful life remained unchanged by the amendments here discussed. Thereafter, when the 1954 Internal Revenue Code was adopted, without any change in the depreciation section of the law, the Treasury promulgated the Regulations under it. They expressly provide:

> "Salvage value is the amount (determined at the time of acquisition) which is estimated will be realized upon sale or other disposition of an asset *when it is no longer useful in taxpayer's trade or business* or in the production of his income *and is to be retired by the taxpayer.*" (Emphasis added.)

It must be borne in mind that there has been no change in the basic statute in any matter here relevant during the entire period of time. We should thus be inclined to look with considerable disfavor on any contention that a slight change in Regulations worked such a double shift in the effect of a simple statute allowing reasonable depreciation. We do not think the Commissioner's Regulations could change the basic concept of depreciation from that announced by the Supreme Court in the Ludey case.

We are supported in our conclusion that there has been no

intent by the Commissioner to effect such a change by the further significant fact that prior to and after the 1942 change in Regulations, there was outstanding the Treasury's Bulletin F, universally recognized by all and sundry familiar with tax problems as representing the Treasury's theories as to the application of depreciation.[7]

This Bulletin includes the following language under the heading "Allowance for Depreciation and Obsolescence":

> "The proper allowance for exhaustion, wear and tear, including obsolescence, of property used in the trade or business is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not necessarily at a uniform rate) whereby the aggregate of the amounts so set aside, plus the salvage value, will at the end of the useful life of the property *in the business*, equal the cost or other basis of the property." (Emphasis added.)

It will thus be seen that notwithstanding the change in Regulation Section 29.23 1-1 in December, 1942, no change has been made in Bulletin F which purports to show the "tendency of official opinion" in the Internal Revenue Service. It cannot well be said that the change above discussed was intended to, or did, change the meaning of useful life.

---

7 Of course, in its initial publication, the Internal Revenue Service was careful to disclaim any authoritative standing for the specific items treated within Bulletin F. Nevertheless, when it was republished in January, 1942, it stated:

"It contains information and statistical data relating to the determination of deductions for depreciation and obsolescence, from which taxpayer and their counsel may obtain the *best available indication of Bureau practice* and the trend and tendency of *official opinion* in the administration of pertinent provisions of prior Revenue Acts."

We conclude that as to a taxpayer so placed that his business experience has taught that automobiles, bought by him for sale but temporarily assigned for use in the business with use in the business averaging less than one third of their total usable life,[8] such automobiles are depreciable by him on the basis of his expected use of the cars in his business and not on the basis of the length of time the car is expected to be usable as a passenger automobile.[9]

The statute allows a reasonable amount for depreciation. No regulation, although valid and binding to the extent it does not enlarge or conflict with the statute, can bind the Commissioner to the allowance of anything more than a reasonable deduction for a whole class of taxpayers. A construction of this regulation as contended for by this taxpayer would result in not only a grossly unreasonable deduction for depreciation, but would offend the basic concept of depreciation and its purpose. We, therefore, cannot approve a construction of the regulation that would reach this result, or if we did so, we would have to hold it invalid as to the factual situation here present as not being authorized by the statute.

As we have previously stated, the basic difficulty here arises

---

8 We have not here commented on the short life of three years here accepted by the trial court. Bulletin F, above referred to, suggests a life of business automobiles, upon the assumption that their entire life is to be a business one rather than for individual or family use, of five years for all except salesmen. It would seem quite unlikely that a useful life of three years for a passenger automobile used only 8,000 to 10,000 miles the first year would be sustainable even on the taxpayer's theory of the law upon a full development of the case. In any event the correct rate of depreciation is dependent upon proof. None was offered by the taxpayer to justify its taking this unrealistically short life without even providing for any salvage value.

9 For a clear and convincing discussion and analysis of this problem, leading the author to the same conclusion we have reached see Montgomery's Federal Taxes, 37th Edition, Chapter 6, page 4, et seq.

from the application of depreciation to a type of property held in such circumstances as would raise much doubt that they were considered as depreciable assets when the law was enacted. So long as taxpayers normally used their capital and other business property for the period of time that they had any substantial vitality left in them the regulations, construed either way, were satisfactory. But when, as here the courts, over the commissioner's opposition, gave Section 117(j) treatment including the right to depreciation, to property used as were these automobiles, it cannot, we think, be said that the Commissioner is bound to his construction of the regulations published under different circumstances, and especially when he consistently took the position that the depreciation regulations did not apply here at all. When he lost that argument he then issued new regulations which do precisely cover this type of property as used here. In doing so he did not intend to and did not—he *could* not—change the law. For us to hold that the new regulations of 1956 had the effect of defining useful life as useful life in the business for the first time would amount to our saying that the Commissioner could by Regulations change the law.

We realize that this conclusion brings us to a different result from that reached by the Court of Appeals for the Ninth Circuit in *Evans v. Commissioner of Internal Revenue*, 9 Cir., ... F. 2d. ...., dec. Jan. 26, 1959, which has been brought to our attention after argument. With deference, we think that decision, reached after a well-reasoned and painstaking analysis, too greatly emphasizes the Regulations as portraying the Commissioner's position. In effect it says that there is no shifting back and forth by the Commissioner on this construction; but that he has always construed useful life as the total life of usefulness and that he is bound by this consistent practice. There is much to be said for the

proposition that taxpayers have a right to rely on the clearly announced construction placed on the laws by the administrative officials whose duty it is to write the regulations and apply them administratively. This is well stated by the excellent opinions in the Evans case. But we feel that that court has overlooked the essential point that all the time these regulations were in effect the Commissioner was making known by litigating everywhere his position that these regulations were not applicable here, no matter how they were construed because he was contending that these were not depreciable assets at all. Under these circumstances, it could not be said that a taxpayer, so circumstanced as Massey Motors, Inc., could rely on the Treasury's position as saying that he could use the combination of capital gains treatment with depreciation deductions to double its profits after taxes on the sale of such assets. So long as the Commissioner was proclaiming at every opportunity that the depreciation regulation did not apply to this situation at all, it cannot be said that he is bound by language which took on no real significance until the courts held against him on his contention. Thereafter he is free, it seems to us, to argue a construction of the regulations that carries out the intent of the statute rather than being bound by one which frustrates it.

The government contends that as a necessary corollary to our conclusion we should find that on the record here the salvage value at the end of this useful life, approximating one year, exceeds cost, and that no depreciation can be taken at all. We think that the attention of the trial court and both parties was so concentrated on the legal principle that too little attention was paid to the fact issue: what would be a reasonable allowance for depreciation under the principles of law here laid down? Without argument touching the point we should not decide for instance whether salvage value

should be the value of the company cars at retail, since that is how they are sold, or whether, since much of the value of the cars in the hands of this taxpayer results from the fact that it is a large buyer and seller of automobiles, the salvage value should be on the wholesale market, since that is the market on which it buys them. We think these matters must be developed on a new trial, which can be limited to such issues as are here discussed without retrying the other issue on which the government does not appeal.

As to the remaining point in the case, the right of the taxpayer to deduct from income for 1951 a small reserve called "Reserve for Repossessions," the parties agree that the same issue has recently been decided by this Court against the government in *Texas Trailercoach, Inc. v. Commissioner*, 5 Cir., 251 F. 2d 395, and also by other Courts of Appeals in *Johnson v. Commissioner*, 4 Cir., 233 F. 2d 952, *Glover v. Commissioner*, [illegible] Cir., 253 F. 2d 735, *Hansen v. Commissioner*, 9 Cir., ... F. 2d ... We think we are bound by those decisions and therefore affirm the action of the trial court touching on this issue. Of course, no final judgment will be entered in the trial court immediately, and in the event the Supreme Court on certiorari already filed decides contrary to our views, the trial court can and should give effect to its decision.

Judgment REVERSED for further proceedings not incon-

sistent with this opinion.

CAMERON, Circuit Judge: I dissent.

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By Clara R. James,
Deputy

New Orleans, Louisiana

March 5, 1959

APPENDIX B

JUDGMENT

Extract from the Minutes of February 26, 1959.

UNITED STATES OF AMERICA,

No. 17279. versus

MASSEY MOTORS, INC.,

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed for further proceedings not inconsistent with the opinion of this Court.

"Cameron, Circuit Judge, dissenting."

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. , October Term, 1958

MASSEY MOTORS, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 13, 1959.

(S) HUGO L. BLACK
Associate Justice of the Supreme Court of the United States

Dated this 22 day of May, 1959.

APPENDIX D

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(1) Depreciation. — A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence) —

(1) of property used in the trade or business, or

(2) of property held for the production of income.

In the case of property held by one person for life with remainder to another person the deduction shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant. In the case of property held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each.

LIBRARY
SUPREME COURT, U. S.

No. 141

Office-Supreme Court, U.S.
FILED
JUL 14 1959
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1958

[illegible], INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE [illegible] CIRCUIT

[illegible] FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 141

MASSEY MOTORS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The issue presented in this case is the same as that in *Commissioner of Internal Revenue* v. *Robley H. Evans, et al.*, No. 143, this Term, pending on petition for writ of certiorari. The decision of the Court of Appeals for the Ninth Circuit in *Evans* is in direct conflict with that of the Court of Appeals for the Fifth Circuit here.

Subsequent to the filing of the petitions for certiorari in both the *Evans* and *Massey* cases, the Court of Appeals for the Third Circuit passed on the basic issue presented here, under the 1954 Code, in the case

of *Hertz Corporation* v. *United States*, decided July 6, 1959. The Third Circuit there stated that, both under and prior to the 1954 Code, "the accepted meaning of the term useful life has always been the period of usefulness of the asset to the taxpayer in his business". The opinion of the Third Circuit in the *Hertz* case is set forth as an appendix to this memorandum.

Thus, there is now a clear and acknowledged conflict of decisions between the Ninth Circuit, on the one hand, and the Fifth and Third Circuits, on the other. For the reasons more fully set forth in the petition for certiorari in *Evans*, the Government believes that the issue is of substantial and continuing importance and, accordingly, agrees that review by this Court is warranted and that the petition for certiorari should be granted in the instant case.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

JULY 1959.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,799

THE HERTZ CORPORATION, A CORPORATION (SUCCESSOR BY MERGER TO J. FRANK CONNOR, INC., A CORPORATION),

v.

UNITED STATES OF AMERICA,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Before KALODNER, STALEY, and HASTIE, *Circuit Judges.*

OPINION OF THE COURT

(Filed July 6, 1959)

By STALEY, *Circuit Judge.*

Essentially this appeal presents two questions for review, namely: (1) whether "useful life" for depreciation purposes as used in Section 167(c) of the Internal Revenue Code of 1954 means the physical life of an asset for business purposes (the economic life),

or the period during which the property is useful to the taxpayer; and (2) whether in the declining balance method of depreciation,[1] authorized by Section 167(b)(2) of the 1954 Code, salvage value is inherent in the method or, rather, is a figure below which depreciation is not permitted.

This is an action for refund of income taxes paid by appellee[2] for the fiscal years ended March 31, 1954, 1955, and 1956, in the amounts of $100.15, $4,044.54, and $10,416.43, respectively. The government has appealed from an adverse judgment rendered by the District Court for the District of Delaware.[3]

Appellee's predecessor, Connor, was organized as a New Jersey corporation on April 2, 1947, and was merged with it on July 5, 1956. During the years pertinent to the inquiry, Connor was engaged in the business of renting and leasing automobiles and trucks, without drivers, in the State of New Jersey.[4]

---

[1] Under the declining balance method of depreciation, a uniform rate is applied each year to the unrecovered cost or other basis of the property; however, such rate may not exceed twice the appropriate straight line rate computed without adjustment for salvage, nor may it be applied to property with a useful life of less than three years. Under the straight line method of depreciation, the cost or other basis of the property less its estimated salvage value is deductible in equal amounts over the period of the estimated useful life of the property. Income Tax Regulations (1954 Code) § 1.167(b)-1 & 2.

[2] The Hertz Corporation is the successor by merger to J. Frank Connor, Inc., the original taxpayer herein. The claims for refund were filed by Hertz after such merger.

[3] The opinion of the district court is reported at 165 F. Supp. 261 (D.C. Del. 1958).

[4] "Renting" is the term used in the industry to describe the hiring of vehicles by salesmen, executives, engineers and

The taxpayer had in operation during this period a preventive maintenance program which called for periodic inspections and servicing. However, the operative condition of the vehicles was a relatively minor factor influencing replacement of the fleet. More important in this regard was the percentage of its fleet being operated regularly; the activities of its competitors; mechanical changes; climatic conditions; strikes and work stoppages; the ability to obtain new cars; whether the country was at war or peace; economic conditions in its business area; and its financial situation. None of these factors were predictable in advance.

Under the influence of these factors the holding period of appellee's cars and trucks varied considerably. The average holding period for automobiles during the 1954-1956 period was 26.17 months, and during its entire nine-year existence, 29.36 months. The corresponding average holding periods for trucks were 38.89 months and 48.26 months.

The president of the Hertz Corporation testified concerning the car rental industry, its relative youth, highly competitive nature, and the factors that influence replacement of the vehicles. Hertz owns and operates a car rental business in approximately 170 cities and licenses operations in 650 additional cities.

Appellee also presented evidence by three certified public accountants to the effect that the term "useful life" has consistently meant and still means the economic life of the asset and not the life of the asset in the hands of the taxpayer. They further indicated that their experience with representatives of the In-

---

tourists at stipulated rates per mile, per hour or day. "Leasing" is the term used to describe the contract hiring of vehicles for a fixed period on a relatively long-term basis (i.e., by the year or for a longer period).

ternal Revenue Service had been that depreciation was computed on the basis of the aggregate business life of the asset regardless of changes of ownership.

Initially, in preparing its returns for the years ended March 31, 1954, March 31, 1955, and March 31, 1956, appellee claimed depreciation on its automobiles on the basis of a four-year useful life at a 30% rate for the first two years and a 20% rate for the remaining two years. Its heavy duty trucks were depreciated on the basis of a five-year useful life, and its other trucks on the basis of a four-year useful life, both at uniform rates. The taxes so computed were paid. Subsequently, on September 14, 1956, appellee filed claims for refunds for the years 1954 and 1955, and on September 17, 1956, filed a claim for 1956. These claims for refund were based on an election in accordance with Section 1.167(c)-1(c) of the Treasury Regulations issued under the Internal Revenue Code of 1954 to utilize the declining balance method of depreciation. Inasmuch as the Commissioner failed to take any action upon the claims within a period of six months, this suit for refund was instituted.

The district court found that by 1954 the term "useful life" had come to mean the entire physical life (economic life) of the asset in question; that in enacting the Internal Revenue Code of 1954 Congress intended to change its meaning to useful life of the asset to the taxpayer; that Section 1.167(a)-1(b) of the Treasury Regulations so defining useful life was valid; that inasmuch as the Commissioner had acquiesced in the economic life construction of the term useful life, the appellee was entitled to rely thereon and the regulations could not be applied retroactively; and finally that salvage value is inherent in the declining balance method of depreciation and therefore there is no authority for application of a limit (rep-

resenting reasonable salvage value) below which assets may not be depreciated. Accordingly, the district court entered judgment for Hertz for the total sum of $14,367.32.

The initial question posed for our consideration relates to the meaning to be ascribed to the term useful life which first appeared in the tax statutes in Section 167(c) of the 1954 Code, limiting the use of the declining balance method of depreciation to property with a useful life in excess of three years. The term was not defined therein. At a much earlier date, however, the term became embedded in the tax regulations relative to depreciation. Accordingly, it is essential for us to consider the history of the various depreciation provisions and the regulations implementing them.

The basic depreciation provision contained in the Revenue Act of 1913, 38 Stat. 114,[5] has remained substantially unchanged throughout all later enactments. Later enactments added provisions regarding obsolescence and incorporated "property held for the production of income" within the purview of depreciable property. However, the theory of depreciation is the same today as it was in 1927 when the Supreme Court considered the problem in United States v. Ludey, 274 U.S. 295, 300-301:

> "* * * The amount of the allowance for depreciation is the sum which should be set aside for the taxable year, in order that, at the end of the useful life of the plant in the business, the aggregate of the sums set aside will (with the

[5] "* * * a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in business * * *."

salvage value) suffice to provide an amount equal to the original cost."

The regulations issued by the Commissioner throughout the history of the income tax have implemented this broad statutory scheme and therein first appeared the term useful life. Prior to issuance of the 1956 regulations, however, no definition of this term was incorporated therein.

Since it is hornbook law that in interpreting undefined statutory language the courts look to common usage and general acceptance, both parties to this action have diligently searched the history of the term. However, as is not uncommon, they came to different conclusions. The government contends that the term useful life means and has always meant the period during which the asset is of use to the taxpayer, while Hertz asserts that it has always meant the economic life of the asset. Thus, neither party supports the opinion of the district court that until 1954 and the enactment of the new Internal Revenue Code the term meant economic life of the asset but Congress changed its meaning in enacting the new code. On the contrary, the parties agree that the meaning of the term, whatever it may be, has remained unchanged throughout the period of its use; i.e., that the 1954 Code was not intended to nor did it change the meaning. Our consideration of the 1954 enactment convinces us that the parties are correct and that Congress in 1954 intended no change in the meaning of the term. The view we take of the case thus requires us to consider the contentions of the parties regarding the accepted meaning of useful life.

Thorough study of the references points up one undisputed fact; that is, few of the cases, treatises, or regulations have addressed themselves to this very problem. The language found therein is imprecise,

unclear, and ambiguous as regards the term useful life. Until the enactment of the 1954 Code and the authorization of the declining balance method of depreciation for assets with a three-year useful life, the problems regarding depreciation involved the reasonableness of the period of useful life. Few, if any, gave a thorough consideration to whether useful life meant economic life or not; rather, most taxpayers were interested in short depreciation periods. Further, most depreciable assets were such as were held by the taxpayer until they were ready to be scrapped and disposed of as no longer useful for their intended purpose.

Hertz's argument in support of the proposition that useful life has always meant the economic life of an asset is basically three-pronged; judicial interpretation, administrative practice, and expert opinion. As regards judicial interpretation—we have been cited to a number of Board of Tax Appeals and Tax Court decisions.[8] However, the issue was not squarely presented nor was any theory of useful life formulated therein; rather, the questions posed in the cases were treated as factual in nature. Thus they are of little, if any, use to us as precedents. It was also noted that Philber Equipment Corp. v. Commissioner of Internal Revenue, 237 F.2d 129 (C.A. 3, 1956), utilized the term useful life in the sense contended for by Hertz.

---

[8] West Virginia and Pennsylvania Coal & Coke Co., 1 B.T.A. 790 (1925); J. R. James, 2 B.T.A. 1071 (1925); Merkle Broom Co., 3 B.T.A. 1084 (1926); Max Kurtz, 8 B.T.A. 679 (1927); Whitman-Douglas Co., 8 B.T.A. 694 (1927); Wallace G. Kay, 10 B.T.A. 534 (1928); Sanford Cotton Mills, 14 B.T.A. 1210 (1929); John A. Maguire Estate, Ltd., 17 B.T.A. 394 (1929); W. N. Foster, 2 T.C.M. 595 (1943); Nat Lewis, 13 T.C.M. 1167 (1954); and Pilot Freight Carriers, Inc., 15 T.C.M. 1027 (1956).

However, a close reading of that opinion indicates that its use of the term may well support either contention. Moreover, the use of the term was not essential to the holding nor was that issue litigated on appeal. Finally, we note two recent appellate opinions in which this very question was presented. In Evans v. Commissioner of Internal Revenue, 264 F.2d 502 (C.A. 9, 1959), the Ninth Circuit found in favor of the contention that useful life has always meant economic life, while in United States v. Massey Motors, Inc., 264 F.2d 552 (C.A. 5, 1959), the Fifth Circuit came to the conclusion that it has consistently meant the length of time the assets are expected to be usable to the taxpayer. See also Cohn v. United States, 259 F.2d 371 (C.A. 6, 1958).

In regard to the administrative practice, it is only fair to note that some of the pronouncements are ambiguous. However, Hertz itself refers us to what we are convinced is a highly significant statement of Bureau position; i.e., Treasury Department Bulletin F. The following statement appears under the heading "Allowance for Depreciation and Obsolescence."

> "* * * The proper allowance for exhaustion, wear and tear, including obsolescence, of property used in trade or business is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not necessarily at a uniform rate) whereby the aggregate of the amounts so set aside, plus the salvage value, will, at the end of the useful life of the property *in the business*, equal the cost or other basis of the property." (Emphasis added.)

Although the Internal Revenue Service originally disclaimed any authoritative standing for the specific items treated in Bulletin F, when it was republished in January, 1942, the following was added:

"* * * It contains information and statistical data relating to the determination of deductions for depreciation and obsolescence, from which taxpayers and their counsel may obtain the *best available indication of Bureau practice* and the trend and tendency of official opinion in the administration of pertinent provisions of the Internal Revenue Code and corresponding or similar provisions of prior Revenue Acts." (Emphasis added.)

Finally, Hertz relies upon the expert opinion of three witnesses, partners in the accounting firms of Ernst & Ernst, Price Waterhouse & Co., and Arthur Andersen & Co., respectively. They were called "to give testimony with respect to their experience in the application of the depreciation provisions of prior revenue acts, and specifically, to give their opinion as to the meaning of the term 'useful life' as it is consistently used and understood for the purposes of depreciation." Whatever persuasiveness this testimony might have is lessened when it is noted that Montgomery's Federal Taxes, 37th ed., 1958, ch. 6, p. 4 et seq., edited by four partners in the accounting firm of Lybrand, Ross Bros. & Montgomery, is directly to the contrary.

Among the other evidence relied upon by Hertz is the fact that in 1942 the depreciation regulations were significantly changed. Prior to December 8, 1942, Section 19.23(*l*)-1 provided an allowance for depreciation which "plus the salvage value, will, at the end of the *useful life of the property in the business*, equal the cost or other basis of the property * * *." (Emphasis added.) The 1942 regulation eliminated the words "property in the business" and substituted the words "depreciable property." Although this change might appear to support Hertz's position on a cursory

glance, a study of the legislative history of the amendment indicates that the change was effected as a result of the amendment of the act so as to include property held for the production of income within the class of depreciable property. No other significance for the change is warranted. See United States v. Massey Motors, Inc., 264 F.2d 552 (C.A. 5, 1959).

We are of the opinion that the accepted meaning of the term useful life has always been the period of usefulness of the asset to the taxpayer in his business. Such a conclusion is in accord with the fundamental concept of depreciation as set forth in United States v. Ludey, 274 U.S. 295 (1927), as further enunciated in Bulletin F, and as adhered to by the appellate courts. United States v. Massey Motors, Inc., supra; Cohn v. United States, 259 F.2d 371 (C.A. 6, 1958). Nothing in the legislative history of the 1954 Code leads us to a contrary conclusion; rather, if anything, it supports the view here expressed and indicates, as the district court noted, that Congress was using the term useful life to mean the period during which an asset is useful to a taxpayer. Therefore, since the automobiles in question had a useful life of less than three years, Hertz is not entitled to depreciate them under the declining balance method of depreciation.

The question concerning the proper application of salvage value to the declining balance method of depreciation need not detain us for long. Congress unmistakably indicated in 1954 when it first authorized the new method of depreciation that "The changes made by your committee's bill merely affect the timing and not the ultimate amount of depreciation deductions with respect to a property." H. Com. Report on H.R. 8300, 83d Cong., 2d Sess., 3 U.S. Code Cong. & Adm. News 4017, 4049 (1954). Thus,

what is changed is the acceleration of depreciation deductions in earlier years but not the total amount of such deductions. We can find no support for Hertz's contention that, since it is theoretically impossible to ever depreciate the entire value of the asset under this system, Congress intended that a taxpayer should be allowed to use the declining balance method to depreciate the asset below a reasonable salvage value. On the contrary, the statement quoted above appears to directly contradict such an assertion. The gist of Hertz's oral argument on this issue is that Congress intended to encourage replacement of equipment through a liberalized depreciation method more in accord with economic realities; that the treatment or lack of treatment of salvage value would also encourage that end by giving a tax benefit to the taxpayer; therefore, Congress must have intended that salvage value not be a limit upon depreciation under the declining balance method. The argument, if it has any validity, should be addressed to the Congress and not to the courts, especially in view of the clear and precise intention of Congress manifested in its committee reports.

The judgment will be reversed.

U. S. GOVERNMENT PRINTING OFFICE 1958 513093 41